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IN THE

Supreme Court of the United States

October Term, 1939.

No. 475.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,

Petitioner,

—against—

THE BERWIND-WHITE COAL MINING COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENT.

JOHN W. DAVIS,
MONTGOMERY B. ANGELL,
MARVIN LYONS,
Attorneys for Respondent.

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INDEX.

	PAGE
Opinions Below	2
Statement of Facts	2
The Coal Produced and Sold	3
The Tonnage Sold	3
The Contracts Covering the Sale of Coal	4
All Deliveries Are Made from the Mines; There Is No Storage in New York	5
The Necessity for Delivery from the Mines	7
The Method of Delivery	7
Deliveries outside New York City	9
The Purchasers Require Delivery from the Mines	9
The Taxing Statutes Involved	10
Construction by the New York Courts of the Taxes Imposed by Local Laws Nos. 20 and 25 as Amended	12
The Character and Incidence of the Taxes	12
The Character of the Seller's Liability under the Sales Tax Law	16
The Taxes Assessed in This Case	17
The Question Presented	17
Summary of Argument	19
Argument	20
I. The tax levied against respondent upon the sales here involved is a direct and undue burden upon interstate commerce in violation of the commerce clause of the Federal Constitution	20
A. The sales here involved are transactions in interstate commerce; interstate shipment was contemplated, required and made	27
B. The event upon which the tax is laid is an inseparable part of an integrated interstate transaction	36

PAGE

C. The tax is invalid as an undue burden upon interstate commerce because, if upheld, the interstate sales would be subject to the danger of multiple and cumulative tax burdens to which local transactions are not exposed 38

II. The use tax cases are clearly distinguishable from the present case 52

Conclusion 58

Appendix A: Summary of Pertinent Provisions of the Contracts Here Involved 59

Appendix B: Local Law No. 25 of 1934 as Amended by Local Law No. 13 of 1935 65

Table of Cases Cited.

Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938), 22, 37, 39, 42, 43*n*, 45, 47, 48, 50, 51, 52, 56, 57

American Mfg. Co. v. St. Louis, 250 U. S. 459 (1919) ..23, 55

Banker Brothers Co. v. Pennsylvania, 222 U. S. 210 (1911) 23, 25, 30, 31, 32

Brennan v. Titusville, 153 U. S. 289 (1894) 37

Brown v. Maryland, 12 Wheat. 419 (1827) 22

Caldwell v. North Carolina, 187 U. S. 622 (1903) 31

Case of the State Freight Tax, 15 Wall. 232 (1872), 22, 40, 43*n*, 46

Cook v. Pennsylvania, 97 U. S. 566 (1878) 22

Crew Levick Co. v. Pennsylvania, 245 U. S. 292 (1917) .. 46

Davis v. Virginia, 236 U. S. 697 (1915) 37

Eastern Air Transport, Inc. v. South Carolina Tax Commission, 285 U. S. 147 (1932) 23

Edelman v. Boeing Air Transport, Inc., 289 U. S. 249 (1933) 23

PAGE

Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62 (1939) 23, 52

Fisher's Blend Station, Inc. v. State Tax Commission, 297 U. S. 650 (1936) 22, 44

Graves v. New York *ex rel.* O'Keefe, 306 U. S. 466 (1939) 46

Graybar Electric Co. v. Curry, —— Ala. ——, 189 So. 186 (1939), 308 U. S. ——, 84 L. Ed. 97 (Nov. 6, 1939) 23, 25, 30, 33, 55*n*

Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434 (1939) 20, 22, 37, 38, 39, 42, 44, 46, 47, 48, 49, 50, 51, 52, 56, 57

Henneford v. Silas Mason Co., Inc., 300 U. S. 577 (1937) 23, 56

In re Lazaroff, 84 F. (2d) 982 (C. C. A. 2, 1936) 16, 45, 55*n*

Matter of Atlas Television Co., Inc., 273 N. Y. 54, 6 N. E. (2d) 94 (1936) 46, 45, 55*n*

Matter of Compagnie Générale Transatlantique (French Line) v. McGoldrick, 279 N. Y. 192, 18 N. E. (2d) 28 (1938) 2, 16

Matter of C. G. Gunther's Sons v. McGoldrick, 279 N. Y. 448, 18 N. E. (2d) 12 (1938) 16, 18

Matter of Felt & Tarrant Mfg. Co. v. McGoldrick, 279 N. Y. 678, 18 N. E. (2d) 311 (1938), *reargument denied*, 280 N. Y. 688, 21 N. E. (2d) 198 (1939) .. 16

Matter of Keslee, Inc. v. McGoldrick, 278 N. Y. 293, 16 N. E. (2d) 288 (1938) 16

Matter of Merchants Refrigerating Co. v. Taylor, 275 N. Y. 113, 9 N. E. (2d) 799 (1937) 16

Matter of National Cash Register Co. v. Taylor, 276 N. Y. 208, 11 N. E. (2d) 881 (1937), *cert. denied*, 303 U. S. 656 (1938) 2, 16, 24

Matter of Sears, Roebuck & Co. v. McGoldrick, 279 N. Y. 184, 18 N. E. (2d) 25 (1938) 16

PAGE

Matter of West Publishing Co. v. Taylor, 276 N. Y. 535, 12 N. E. (2d) 565 (1937), *cert. denied*, 303 U. S. 656 (1938) 16, 24

Monamotor Oil Co. v. Johnson, 292 U. S. 86 (1934) 23

Montgomery Ward & Co., Inc. v. Fry, 277 Mich. 260, 269 N. W. 166 (1936) 25

New York City v. Goldstein, 299 U. S. 522 (1937), ... 16, 45, 55*a*

Pacific Telephone & Telegraph Co. v. Gallagher, 306 U. S. 182 (1939) 23, 52

Philadelphia and Southern Steamship Co. v. Pennsylvania, 122 U. S. 326 (1887) 22

Puget Sound Stevedoring Co. v. State Tax Commission, 302 U. S. 90 (1937) 36, 37, 43*a*

Real Silk Hosiery Mills v. Portland, 268 U. S. 325 (1925) 37, 38

Rearick v. Pennsylvania, 203 U. S. 507 (1906) 31, 37

Robbins v. Shelby County Taxing District, 120 U. S. 489 (1887) 31, 37, 38, 46

Southern Pacific Co. v. Gallagher, 306 U. S. 167 (1939) 23, 52, 53, 54, 55

Superior Oil Co. v. State of Mississippi, 280 U. S. 390 (1930) 34, 35, 57*a*

Walling v. Michigan, 116 U. S. 446 (1886) 22

Ware and Leland v. Mobile County, 209 U. S. 405 (1908) 23, 30

Webber v. Virginia, 103 U. S. 344 (1880) 22

Welton v. Missouri, 91 U. S. 275 (1875) 22

Western Live Stock v. Bureau of Revenue, 303 U. S. 250 (1938) 22, 26, 39, 43*a*, 44, 50*a*, 56, 57

Williamsburgh Power Plant Corp. v. City of New York, 255 App. Div. 214, 7 N. Y. S. (2d) 326 (1938), *affd. without opinion*, 280 N. Y. 551, 20 N. E. (2d) 12 (1939) 12

Wiloil Corp. v. Pennsylvania, 294 U. S. 169 (1935), ... 23, 25, 30, 32

Table of Statutes Cited.

	PAGE
Laws of the State of New York, 1934, Ch. 873	10, 13, 18
New York City Local Law No. 9 of 1934	50*a*
New York City Local Law No. 17 of 1934	50*a*
New York City Local Law No. 20 of 1934 as amended by No. 24 of 1934	10, 11, 12, 15, 17, 36, 53, 56
New York City Local Law No. 25 of 1934 as amended by No. 13 of 1935	11, 12, 17, 52, 53, 58
New York City Local Law No. 32 of 1935	50*a*
New York City Local Law No. 29 of 1936	50*a*
New York City Local Law No. 22 of 1937	50*a*
New York City Local Law No. 20 of 1938	50*a*
New York City Local Law No. 103 of 1939	50*a*
New York City Business Tax Regulations, Art. 238	50*a*
Statutes of California, 1933, Ch. 1020	54*a*, 55*a*
Statutes of California, 1935, Ch. 361 as amended by Statutes of California, 1937, Chs. 401, 671 and 683	54*a*, 55*a*, 56, 58

Other Authorities.

Conflicting Interpretations of Retail Sales Tax Laws, by Neil H. Jacoby, 2 U. of Chicago L. R. 78 (1934)	25
Tax Systems of the World (7 Ed. 1938) and 1939 Supplement Thereto	24

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THE BERWIND-WHITE COAL MINING COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENT.

The case comes to this Court on a writ of certiorari granted on December 4, 1939 to review the judgment of the New York Court of Appeals (R. 159, amended R. 158) annulling petitioner's determination that respondent is liable for New York City sales taxes in the amount of $176,703.89, including penalties of $36,185.92 for the period from December 10, 1934 to December 31, 1935. The case originated with the issuance to respondent of a preliminary notice of deficiency (R. 13). Thereafter a hearing was had before petitioner's predecessor as Comptroller of the City of New York (R. 21), and upon the record made at that hearing the Comptroller made a final determination of a deficiency in tax in the amount of $140,517.97 and penalties in the amount of $36,185.92 (R. 21). Respondent thereupon made payment under

protest to the Comptroller of the sum of $176,703.89, which it was required to do in order to perfect its right to have his determination reviewed (R. 22-3). Upon review by the Appellate Division, First Judicial Department, of the New York Supreme Court, that court entered an order annulling the Comptroller's determination and ordering refund to respondent of the amount paid (R. 149). The judgment now here for review is the judgment of the Court of Appeals affirming the order of the Appellate Division.

Opinions Below.

The opinion of the Appellate Division (R. 150; reported in 255 App. Div. 961) annulling the Comptroller's determination is a memorandum opinion rendered on the authority of *Matter of National Cash Register Company* v. *Taylor*, 276 N. Y. 208, cert. denied, 303 U. S. 656, and *Matter of Compagnie Generale Transatlantique (French Line)* v. *McGoldrick*, 279 N. Y. 192 (one of the companion cases now before this Court). The Court of Appeals affirmed without opinion (R. 152; 281 N. Y. mem. 34, 22 N. E. (2d) 173 (1939)), but its remittitur was later amended to state that the order of the Appellate Division was affirmed "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art. 1, Sec. 8, Cl. 3) of the Constitution of the United States" (R. 158; 281 N. Y. mem. 94, 22 N. E. (2d) 764 (1939)).

Statement of Facts.

Respondent, The Berwind-White Coal Mining Company, is a corporation organized in 1888 under the laws of Pennsylvania, having its main office in Philadelphia and a sales office in New York City.

For more than 40 years past it has been engaged in the business of producing bituminous coal from its own mines in Pennsylvania and selling such coal to consumers and dealers (R. 27, 28). The only mines owned by respondent are located in Somerset and Cambria Counties in Pennsylvania. It is from these mines that respondent supplies the requirements of its customers located in New York City (R. 28, 29).

The Coal Produced and Sold.

The mines owned by respondent in Pennsylvania cover two veins of coal called "B Seam" and "C Prime Seam" (R. 28). The coal produced from the B seam has been sold by respondent for the past 40 years under the trade name "Berwind's Eureka" and the coal produced from the C Prime seam has been sold under the trade name "Berwind's Standard C Prime" (R. 28). Respondent's mines in Pennsylvania are the only source of the coal sold by it under these trade names (R. 28, 29). The Eureka (B Seam) coal is superior in quality to the C Prime coal (R. 28) and is obtainable only from mines within an area of some 150 square miles in Pennsylvania (R. 68-9, 105). The B seam coal, on account of its physical, chemical and burning qualities, is particularly well adapted to use by the public utility and steamship companies as fuel in the generation of steam (R. 28-9). The C Prime coal, which comes from the same area, is sold to dealers and small industrial plants (R. 29).

The Tonnage Sold.

The annual tonnage sold by respondent to New York City customers is approximately 1,500,000 tons.

consisting of approximately 1,100,000 tons of Eureka coal to public utility companies, approximately 200,000 tons of Eureka coal to steamship companies and others, and approximately 200,000 tons of C Prime coal to dealers and industrial companies (R. 29). Sales to dealers are not here involved.

Of the twenty purchasers involved in this proceeding five are public utility companies, eleven are steamship companies, one is a ship repair company and three are industrial companies. The following table shows the receipts from sales during the period from December 10, 1934 to December 31, 1935 to the various classes of New York City customers excluding dealers (R. 109):

Public utility companies (Berwind's Eureka coal):	
Brooklyn Edison Co.	$2,467,164.83
New York Edison Co. and United Electric Light & Power Co.	2,038,109.29
Interborough Rapid Transit Co.	2,038,204.28
Williamsburgh Power Plant Corp.	696,400.96
Total to public utility companies	$7,239,879.36
Steamship companies (Berwind's Eureka coal)	266,822.05
Industrial companies (Berwind's C Prime coal)	31,238.68
Total	$7,537,940.09

The Contracts Covering the Sale of Coal.

All of respondent's contracts for the sale of coal to New York City customers are made in New York City (R. 76). All but a small portion of respond-

ent's sales are made pursuant to term contracts providing for delivery over a period of time, usually one year. The remaining sales are made pursuant to spot contracts covering orders for immediate delivery (R. 45-6). In all but two instances during the period here in question the contracts provided for delivery to the purchasers by barge alongside the purchasers' plants or steamships. The exceptions were the contracts with Austin, Nichols & Co., which provided for delivery to the purchaser on board cars at respondent's mines in Pennsylvania (R. 139), and the contracts with New England Steamship Company, which provided for delivery to the purchaser at Harsimus Pier, Jersey City (R. 130, 131). The subject matter of the contracts with 17 companies (including all the public utility and steamship companies) was Berwind's Eureka coal and the subject matter of the contracts with the remaining three industrial companies was Berwind's C Prime coal. All the contracts contained provisions clearly expressing the intention of the parties that the coal be shipped from respondent's mines in Pennsylvania. A summary of the pertinent provisions of the several contracts here involved is set forth in Appendix A at pages 59 *et seq., infra.*

All Deliveries Are Made From the Mines; There Is No Storage in New York.

Respondent fulfills all its contracts with New York City customers by direct shipment of the coal from its mines in Pennsylvania. This has been its invariable practice for the past 40 years and all deliveries during the period here in question were so made (R. 31-2, 58-9, 63-4). Respondent has never had any coalyards, warehouses or other facilities for the

storage of coal in New York (R. 30). Mr. Dunlap, the President of respondent, testified as follows (R. 30):

> "Q. Will you explain why the company has never had any such [storage] facilities? A. The conditions and character of our business do not require it, as we make deliveries direct to customers from our mines via the Pennsylvania Railroad and barges and tugboats to destination. They have the storage facilities necessary to protect their coal supply."

Mr. Savage, Purchasing Agent for New York Edison Company, one of the purchasers, testified as follows (R. 71):

> "Q. * * *, is storage coal as good in quality for the purpose of use in your plants as coal that comes directly from the mines, freshly mined coal? A. The freshly mined coal is better. Coal in storage depreciates in value in time.
>
> Q. Then you prefer to have coal come directly from the mines? A. Yes."

And at R. 91:

> "Q. Would not the storage facilities necessary to supply plants such as yours require a tremendous amount of space and investment? A. Yes.
>
> Q. And the coal delivered, if any such storage were maintained, the coal would have to be delivered to your plants by barge, wouldn't it? A. It would.
>
> Q. Do you know of any coal mines in the state of New York? A. I know of none.
>
> Q. And the coal kept in such storage would have to be brought in from outside the state? A. That is right.
>
> Mr. Baum: You know that many sellers of coal have coal stored here, don't you?

The Witness: I know that there is coal stored in the city of New York, but not in the quantities to take care of our requirements."

The Necessity for Delivery From the Mines.

The public utility customers of respondent require daily deliveries of coal in large quantities (R. 69). In 1934 and 1935 respondent delivered from 25,000 to 30,000 tons of coal per week to such companies (R. 61-2). Delivery of coal to the plants of the public utilities in the quantities required can be made only by water, since all such plants are on the waterfront and are constructed to receive coal only from the water side (R. 61). Deliveries of coal to steamships and to most of the industrial plants must also be made by water (R. 61).

In view of these conditions, and in order to assure the public utility companies and other large consumers of coal in New York City a steady supply of coal from the mines and to protect them against shortages and delays, respondent for the past 40 years has maintained its own delivery system; it has owned and still owns railroad cars, barges and tugboats, used in carrying the coal from the mines to the plants and steamships of its customers (R. 30, 31).

The Method of Delivery.

Respondent's regular practice in making deliveries of coal to purchasers in New York City is as follows:

The purchasers notify respondent by telephone at its New York office of their requirements, and the orders are transmitted by the New York office to the mines in Pennsylvania. The public utility companies notify the New York office on Thursday of each week of their requirements for the following week; the total tonnage requirements are computed

at the New York office and are immediately transmitted to the mines in Pennsylvania (R. 62-3).

The requirements of the steamship companies depend upon the arrival of steamships in New York harbor. Orders for coal to be delivered to particular steamships are received at the New York office well in advance of the scheduled arrival of the ships, and are transmitted to the mines (R. 62-3).

In transmitting the orders two days are allowed for mining the coal and five days are allowed for transportation. The coal is mined upon receipt of the orders (R. 63).

The coal is loaded on the railroad cars at the mines, and the cars are then hauled over the Pennsylvania Railroad to Harsimus Pier in Jersey City. Each car is accompanied by a waybill which designates by name or number the particular mine from which the coal was taken, the kind of coal, and the weight. Upon arrival at Harsimus Pier the coal is dumped from the cars into the barges; each barge is loaded for delivery to a particular purchaser pursuant to a particular order, and each barge load is covered by a bill of lading, delivered to the purchaser, designating the purchaser as consignee. Upon being loaded, the barges are towed to the purchaser's plant or steamship. Delivery to the purchaser is complete when the barge comes alongside the plant or steamship; the coal is unloaded into the plant or steamship by the purchaser (R. 64-5).

The payments for the coal by the purchasers are made by checks, which in some instances are sent directly to the Philadelphia office and in other instances are received at the New York office and transmitted to Philadelphia, where they are deposited (R. 102).

The foregoing practice was followed by respond-

ent in fulfilling all contracts requiring delivery in New York City during the period December 10, 1934 to December 31, 1935 (R. 64).

Deliveries Outside New York City.

There were two purchasers during the period here involved who took delivery outside New York City. The contracts with Austin, Nichols & Co. (Ex. 25, R. 139) required delivery on board cars at the mines and were actually fulfilled by delivery to that company on board cars at the mines in Pennsylvania (R. 53). The contracts with New England Steamship Company (Ex. 21, R. 130) required "delivery to be made to New England Steamship Company at Harsimus Pier, Jersey City" and were actually fulfilled by delivery to that company at Harsimus Pier, Jersey City (R. 44, 51).

The Purchasers Require Delivery From the Mines.

The purchasers here involved, all of whom had purchased coal from respondent for a number of years prior to 1934, were informed that the coal was produced by respondent from its mines in Pennsylvania, and that its practice was to make delivery by shipment from its mines (R. 30, 31, 47, 56-7).

With respect to the delivery practice, Mr. Savage, Purchasing Agent for New York Edison Company, testified as follows (R. 77):

> "Q. Does the fact that the Berwind-White Company has consistently maintained the delivery facilities that you have described and has delivered coal under the practice you have described have any bearing on your negotiation of contracts for the purchase of coal from them? A. That is the reason we continue to do business with them."

The Taxing Statutes Involved.

The authority of the City of New York to impose both the City sales tax and the City "property" or "use" tax is derived from the Enabling Act enacted by the New York State Legislature on August 18, 1934 (Chapter 873, Laws of the State of New York, 1934). The full text of the Enabling Act is printed in petitioner's Appendix of Statutes as Appendix B. The Enabling Act authorized any city of the State of New York having a population of 1,000,000 inhabitants or more to adopt local laws imposing any taxes "which the legislature has or would have power and authority to impose", but such taxes shall have application "only within the territorial limits of any such city". The Act expressly prohibited "the imposition of a tax on any transaction originating and or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits." The act expressly contemplated the imposition of taxes "on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city."

Under the authority of the Enabling Act, the City of New York enacted on December 5, 1934 Local Law No. 20† imposing a tax of 2% upon the gross receipts from sales of tangible personal property sold at retail in New York City. Local Law No. 20 was amended by Local Law No. 24††, enacted December

† Published as Local Law No. 21 in the official compilation entitled "Local Laws of the Cities in the State of New York enacted during the year 1934".

†† Published as Local Law No. 25 in the official compilation.

28, 1934. On the same day (December 28, 1934) the City enacted Local Law No. 25† imposing a tax of 2% upon the purchase price of certain articles of tangible personal property situated or owned within the City of New York. The full text of Local Law No. 24 is printed in petitioner's Appendix of Statutes as Appendix A. The full text of Local Law No. 25, as amended in minor particulars by Local Law No. 13 of 1935, is printed in Appendix B to this brief at pages 65 *et seq., infra.*

The Sales Tax Law is entitled "Tax on Sales of Certain Properties and Rendering of Certain Services in the City of New York." Section 2, imposing the tax, provides that "there shall be paid a tax of two per centum upon the amount of the receipts from every sale in the city of New York of: (a) Tangible personal property, sold at retail," etc., and further provides that "receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax, shall not be subject to tax hereunder." The vendor is required (§5) to make return of his receipts and of the taxes payable thereon, and is also required (§6) to pay such taxes to the Comptroller at the time of filing the returns. The vendor is further required (§2) to state and charge the tax separately from the sale price and is given the same right to collect the tax from the purchaser as if the tax were a part of the purchase price of the property. Where the vendor has failed to collect such tax, the purchaser is required to file a return with the Comptroller and to pay the tax to the Comptroller.

Local Law No. 25 as amended provides (§1) that "there shall be paid by the owner a tax of two per

† Published as Local Law No. 26 in the official compilation.

centum upon the value of the following-named articles of personal property situated or owned within the city of New York" [listing various items and classes of items of tangible personal property]. Section 3 provides that "such articles of personal property as are subject to such tax shall be evaluated for taxing purposes at the actual purchase price". Exemptions from the tax (§2) include articles purchased prior to January 1, 1935 and articles upon the receipts from sale of which the tax imposed by the Sales Tax Law is payable. The tax imposed by Local Law No. 25 as amended is complementary to the tax imposed by Local Law No. 20 as amended by No. 24.

Construction by the New York Courts of the Taxes Imposed by Local Laws Nos. 20 and 25 as Amended.†

The Character and Incidence of the Taxes.

The New York courts have made it perfectly clear that the sales tax imposed by Local Law No. 20 as amended is a tax upon the transaction of sale as distinguished from a tax upon ownership or use of the article by the purchaser, and that the complementary or compensating tax imposed by Local Law No. 25 is an excise tax upon the use by the purchaser of the article purchased. This construction of these statutes was urged by the City and was adopted by the Appellate Division, Second Department, and approved by the Court of Appeals in *Williamsburgh Power Plant Corp.* v. *City of New York*, 255 App. Div. 214, affirmed without opinion, 280 N. Y. 551. In that case, the validity of the tax imposed by Local Law No. 25 was challenged upon the ground that

† Local Law No. 20 of 1934 was amended by No. 24 of 1934; Local Law No. 25 of 1934 was amended by No. 13 of 1935.

it was imposed upon *transactions of purchase* consummated outside the City, such transactions being beyond the power of the City to tax under the Enabling Act. In upholding the validity of the tax the Appellate Division said (pp. 216-8):

"This Local Law No. 25 of 1934 is a complement to Local Law No. 21* of 1934, which imposed a two per cent sales tax. The two statutes are part of a general tax plan.

"Plaintiff says that Local Law No. 25 is invalid because the enabling act herein quoted expressly provides that the act shall not authorize the imposition of a tax 'on any transaction' originating outside the city. It resorts to various characterizations of the kind of tax imposed by Local Law No. 25. The precise name to be attached thereto is not vital. Only its true nature is material and the label is not conclusive. It is sufficient to note that the tax is an indirect tax, and to that extent it is an excise tax—a tax upon the consumption of or the opportunity to use property, rather than upon the property itself. A tax which is identical has been called a 'use' tax.

"The language which, plaintiff says, bars the enactment of Local Law No. 25 reads: 'This act shall not authorize the imposition of a tax *on any transaction* originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.'

"If the tax imposed is deemed to be upon a 'transaction' originating outside the city, the statute attacked may not be sustained. But plaintiff's argument ignores the sentence which follows the one just quoted. The sentence thus conjoined, so far as pertinent, reads: 'This act shall not au-

* Local Law No. 20 is published as No. 21.—[Rep.

thorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, *except when imposed without discrimination as between residents and non-residents, on account of tangible property actually located * * * within such city.*'

"It is true that tax laws are to be strictly construed, but strict construction does not permit the ignoring of explicit language. The last quoted sentence should be construed as its plain import requires—that the prohibition against the imposition of a tax upon any transaction outside the city does not preclude the levying of a tax 'on account of tangible property actually located * * * within such city,' because it is subject to a clear limitation. In other words, while the city may not impose a tax upon a transaction without its confines which concerns the sale of goods, the language in the last quoted sentence, by the exception contained therein, authorizes the levy of a tax 'on account of tangible property actually located * * * within such city;' that is, it authorizes a 'use' tax. It is well recognized that the taxing power may be exercised upon one or all the attributes of the ownership of property; that is, a tax may be levied on one attribute which relates to a transaction involving a purchase or sale, and in another instance a tax may be levied on the attribute of ownership which concerns the use of property as distinguished from the transaction which involves the acquisition of the property that enables the use. (*Henneford* v. *Silas Mason Co.*, 300 U. S. 577.) In the cited case statutory provisions substantially identical with those here involved were passed upon. The statute characterized a similar excise tax as a 'compensating tax' but the court called it a 'use' tax. There, as here, the use or compensating tax was a complement to another or sales tax in like amount, levied upon

purchases of property within the State of Washington, while the compensating tax was laid upon property which became located in the State of Washington, and, therefore, usable in that State as the result of a transaction or purchase without the State. The language of Cardozo, *J.*, is as pertinent to the tax here involved as to the one there under consideration. It was held that the so-called 'compensating tax was a use tax validly levied upon property which came to 'rest' within the State after the purchase transaction had been concluded elsewhere. This was because the property thus became part of the mass of property within the State and, therefore, subject to a tax upon its use. The claim that the tax was a mere subterfuge or pretense and was in fact and reality a tax upon the property purchased or the transaction had without the State, was rejected. This was on the theory that the separating, for taxing purposes, of the transaction of purchase from the act of locating the property within the State was within legislative competence; that the field of choice of the Legislature was so broad that a tax might be laid on any one or a few of the attributes of ownership. It was further held that the choice was for the Legislature and that the motives leading to the adoption of the tax were not a concern of the court, especially where the tax, apart from motives, would be otherwise lawful.

"The tax attacked, therefore, is a tax on 'use' and not a tax upon the 'transaction' or purchase, and the levying of such a tax by the city is authorized and not prohibited by the enabling act."

The sales tax imposed by Local Law No. 20 as amended by No. 24 is clearly a tax upon the transaction of sale as distinguished from a tax upon the use or ownership of the property after its acquisition by the buyer. *Matter of C. G. Gunther's Sons* v. *Mc-*

Goldrick, 279 N. Y. 148; *Matter of National Cash Register Co.* v. *Taylor*, 276 N. Y. 208, cert. denied 303 U. S. 656; *Matter of West Publishing Co.* v. *Taylor*, 276 N. Y. 535, cert. denied 303 U. S. 656; *Matter of Sears, Roebuck & Co.* v. *McGoldrick*, 279 N. Y. 184; *Matter of Compagnie Generale Transatlantique* v. *McGoldrick*, 279 N. Y. 192; *Matter of Felt & Tarrant Mfg. Co.* v. *McGoldrick*, 279 N. Y. 678.

The Character of the Seller's Liability Under the Sales Tax Law.

It is also clear that liability for payment of the tax imposed by the sales tax law is imposed upon both the seller and the purchaser. While the seller has both the right and the duty to collect the tax from the purchaser, he is nevertheless liable for the tax whether or not he is able to collect from the purchaser. In bankruptcy the liability of the seller is treated as a tax liability, as distinguished from a debt, and accordingly gives the City priority over other creditors. *Matter of Atlas Television Co., Inc.*, 273 N. Y. 51; *New York City* v. *Goldstein*, 299 U. S. 522, reversing *In re Lazaroff*, 84 F. (2d) 982. Thus, as between the City and the seller, the seller is a taxpayer, and respondent is so designated in petitioner's brief. The cases of *Matter of Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113 and *Matter of Kexbee, Inc.* v. *McGoldrick*, 278 N. Y. 293, referred to at page 7 of petitioner's brief as authority for the proposition that the tax is not imposed upon the seller, hold that the tax is imposed upon the buyer, but are not inconsistent with the decision in the *Atlas* and *Goldstein* cases treating the seller's liability as a tax liability.

The Taxes Assessed in this Case.

Petitioner has assessed and collected from respondent a tax of 2% upon the entire gross receipts from all sales made by respondent to purchasers located in New York City, including sales which were completed by delivery and transfer of title to the purchasers outside the City and State of New York. Petitioner has also assessed and collected from some of the same purchasers a "use" tax under Local Law No. 25 of 2% upon the amount of the purchase price of coal purchased from respondent within the period here involved, although the same receipts from the sale of the same coal to these very purchasers were made the basis of the assessment of the sales taxes here involved against respondent (R. 84, 85, 89).

Sales tax was assessed against and collected from one of the purchasers (Williamsburgh Power Plant Corporation) upon part of respondent's sales to that purchaser and in making his final determination petitioner deducted those taxes from the deficiency against respondent (R. 22). However, no such deduction or credit was made in respect of the "use" taxes assessed against and collected from respondent's purchasers on account of the tax under Local Law No. 25.

The Question Presented.

The decision of the New York Court of Appeals having been predicated "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause * * * of the Constitution of the United States" (R. 158), and petitioner having raised no other question in his petition for certiorari, we assume that the only question which will be considered

by this Court at this time is whether the City sales taxes assessed against and collected from respondent upon its sales (some of which sales were completed by delivery and transfer of title to the purchasers outside the City and State of New York) constitute a burden upon interstate commerce in violation of the commerce clause.

There is another question in the case relating to the sales which were consummated outside New York City. The City is without power to tax these sales because the Enabling Act expressly prohibits the City from imposing a tax upon "any transaction originating and/or consummated outside the territorial limits" of the City. *Matter of C. G. Gunther's Sons* v. *McGoldrick*, 279 N. Y. 148. Although this subsidiary question was raised and argued below, the Court of Appeals did not decide it, putting its decision solely upon the federal ground. In the event of an affirmance by this Court of the decision below it will be unnecessary to have that question decided. However, if this Court should render an adverse decision on the federal question, the question under the State Enabling Act would remain for decision by the Court of Appeals, and the case should be remanded to the Court of Appeals by this Court for further proceedings to determine the application of the State Enabling Act to those sales which were consummated outside the City and State of New York.

Summary of Argument.

I.

The tax levied against respondent upon the sales here involved is a direct and undue burden upon interstate commerce in violation of the commerce clause of the Federal Constitution.

A. The sales here involved are transactions in interstate commerce; interstate shipment was contemplated, required and made.

B. The event upon which the tax is laid is an inseparable part of an integrated interstate transaction.

C. The tax is invalid as an undue burden upon interstate commerce because, if upheld, the interstate sales would be subject to the danger of multiple and cumulative tax burdens to which local transactions are not exposed.

II.

The use tax cases are clearly distinguishable from the present case.

Argument.

I.

The tax levied against respondent upon the sales here involved is a direct and undue burden upon interstate commerce in violation of the commerce clause of the Federal Constitution.

This Court, in a long line of decisions involving the power of the states and their local subdivisions to impose taxes affecting interstate commerce, has construed the commerce clause as affording protection to interstate commerce against the imposition of direct and undue burdens by local taxation; and in the light of this construction it has clearly marked out both the field which the protection covers and the limits of the power of local taxing authorities seeking to enter that field. Recognizing on the one hand the need of local governments for revenue, and on the other hand the necessity of keeping the channels of interstate trade free of locally created barriers, this Court has laid down clearly defined principles giving full weight to the competing claims that while interstate commerce must bear its fair share of local tax burdens it must not be subjected to the danger of tax burdens that interfere with the free flow of interstate commerce. As this Court said in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 441:

> "For more than a century, since *Brown* v. *Maryland*, 12 Wheat. 419, 445, it has been recognized that under the commerce clause, Congress not acting, some protection is afforded to interstate commerce against state taxation of the privi-

> lege of engaging in it. * * * For half a century, following the decision in *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, it has not been doubted that state taxation of local participation in interstate commerce, measured by the entire volume of the commerce, is likewise foreclosed. During that period Congress has not seen fit to exercise its constitutional power to alter or abolish the rules thus judicially established. Instead it has left them undisturbed, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn. Meanwhile Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system. There has been left to the states wide scope for taxation of those engaged in interstate commerce, extending to the instruments of that commerce, to net income derived from it, and to other forms of taxation not destructive of it. See *Western Live Stock* v. *Bureau of Revenue*, *supra*, 254, *et seq.*, and cases cited."

As we read the decisions of this Court, there are two separate and distinct aspects of the question at bar. First, it is necessary to determine whether the activity or event on which the tax is laid is within the field of interstate commerce; and, if so, the second question is whether the tax imposed is a legitimate exercise of state taxing power within that field.

The principles applicable to these two aspects of the question, in so far as they bear upon the case at bar, may, we believe, be stated in short compass. These principles are concerned with two factors, namely (1) the event or activity upon which the tax is laid, and (2) the measure of the tax.

A tax directed in terms or in its practical operation against interstate commerce as such, thereby discriminating in favor of local commerce, obviously interferes with the free flow of interstate commerce and is invalid. *Walling* v. *Michigan*, 116 U. S. 446; *Webber* v. *Virginia*, 103 U. S. 344; *Welton* v. *Missouri*, 91 U. S. 275; *Cook* v. *Pennsylvania*, 97 U. S. 566; *Brown* v. *Maryland*, 12 Wheat. 419.

A tax which is laid equally upon both local and interstate commerce may or may not be valid as applied to interstate transactions, depending upon how it is measured. If the measure of the tax be such that taxes levied upon the same interstate transaction by other states would result in a greater burden upon that transaction than is imposed upon similar local transactions, the tax is invalid because the exposure of the interstate transaction to those multiple tax burdens is discriminatory. In other words, a tax laid upon interstate sales, even though laid equally upon local sales, violates the commerce clause if it is measured by the entire gross receipts from such sales without a proper apportionment to the activities carried on within the state, for if the tax were upheld each state involved in the interstate movement could with equal right impose a tax similarly measured upon the same transactions. *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 255-6; *Fisher's Blend Station, Inc.* v. *State Tax Commission*, 297 U. S. 650; *Philadelphia and Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Case of the State Freight Tax*, 15 Wall. 232.

On the other hand, a nondiscriminatory local tax laid upon the ownership or the use of property purchased in interstate commerce is valid even though

measured by the purchase price of the property, since the events or activities upon which the tax is imposed are purely local, occurring after interstate commerce has come to an end. *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167; *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62; *Pacific Telephone & Telegraph Co.* v. *Gallagher*, 306 U. S. 182; *Henneford* v. *Silas Mason Co., Inc.*, 300 U. S. 577; *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86. Similarly, a local tax laid upon an event or activity, such as manufacturing or storage and withdrawal, completed within the taxing state before the interstate commerce begins, is valid though measured by the sale price of the property. *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459; *Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249; *Eastern Air Transport, Inc.* v. *South Carolina Tax Commission*, 285 U. S. 147.

There is another principle which this Court has applied in defining an interstate sale for tax purposes. The mere fact that the goods sold have been shipped across state lines is not enough in and of itself to bring the transaction within the protection of the commerce clause. That protection is afforded only to a transaction in which the interstate shipment of the goods is contemplated and required. *Ware and Leland* v. *Mobile County*, 209 U. S. 405; *Banker Brothers Co.* v. *Pennsylvania*, 222 U. S. 210; *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169; *Graybar Electric Co.* v. *Curry*, 308 U. S. ——, 84 L. Ed. 97, affirming —— Ala. ——, 189 So. 186.

This qualifying principle is no doubt a salutary one, for it tends to limit the scope of the protection of the commerce clause to transactions which are necessarily interstate transactions and prevents the use by taxpayers of the protective cloak of the commerce

clause as a means of avoiding taxes which they otherwise would have to pay.

This Court has been at great pains to make clear the principles applicable to taxation affecting interstate commerce, particularly for the guidance of local authorities in the enactment and enforcement of tax legislation, so that these important functions may be carried on in accordance with the Constitution. These principles have been studiously observed by a great many states in framing their tax legislation and in enforcing their tax laws.† Indeed the City of New York itself, when it came to enact its own legislation on this subject, followed the lead of other states and enacted both the sales tax and a compensatory "use" tax (see pp. 10-12, *supra*).

The state courts in passing upon the validity of sales and use taxes have also been guided by these principles. The sales tax here in question was held invalid as applied to interstate sales by the New York Court of Appeals, and the City's application to this Court for a review on certiorari was denied in 1938. *Matter of National Cash Register Co.* v. *Taylor*, 276 N. Y. 208; cert. denied 303 U. S. 656; *Matter of West Publishing Co.* v. *Taylor*, 276 N. Y. 535; cert. denied 303 U. S. 656. The present case and its companion

† In addition to New York City, thirteen states have retail sales taxes and compensating or use taxes: Alabama, Arkansas, California, Colorado, Iowa, Kansas, Michigan, North Dakota (use tax on motor vehicles only), Ohio, Oklahoma, Utah, Washington and Wyoming. A few other states have retail sales taxes only, and several other states have license taxes for the privilege of carrying on certain types of business, measured variously by gross income, gross receipts or gross value of sales or of purchases. See table compiled by Neil H. Jacoby as of July 1, 1937, in Tax Systems of the World (7 Ed. 1938, pp. 153-6) by The Tax Research Foundation, and 1939 supplement thereto.

cases were decided by the Court of Appeals on the authority of those decisions. The highest court of the State of Michigan has followed the same principles. *Montgomery Ward & Co., Inc.* v. *Fry*, 277 Mich. 260, 269 N. W. 166. Cases like *Graybar Electric Co.* v. *Curry*, 308 U. S.——, 84 L. Ed. 97, affirming ——Ala. ——, 189 So. 186, in which a sales tax was upheld, stand upon the same footing as *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169 and *Banker Brothers Co.* v. *Pennsylvania*, 222 U. S. 210. These cases held that the transactions in question were not protected by the commerce clause, because the sales taxed were local sales by dealers, and interstate shipment of the goods was not contemplated and required. These

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As regards administration of these laws by local tax authorities Mr. Jacoby, then Supervisor of Research, Department of Finance, State of Illinois, said in *Conflicting Interpretations of Retail Sales Tax Laws*, 2 U. of Chicago L. R. 78, 96-7 (1934):

> "Only a few comments will be made herein in reference to regulations on interstate commerce, as conflicting interpretations have not been numerous. State sales tax authorities have generally looked to the physical movement of merchandise in reaching a determination as to the taxability of particular transactions, and correctly so. Place where contract was entered into, or purchase price paid, or where the vendor or purchaser reside or do business have been regarded as incidental factors. Regulations on this subject may be conveniently divided into two divisions, namely: (1) regulations respecting when interstate commerce ends, relating to movements of goods *into* a taxing state and (2) regulations respecting when interstate commerce begins, relating to movements of goods *out* of a taxing state. Where both state of origin and state of destination impose sales taxes, it will be readily understood that sales in interstate commerce between them involve one of these classes of regulations for one state and the reciprocal class for the other.
>
> The regulations of the states are in unanimous agreement that a sale which involves shipment or delivery of the goods from a vendor's stock to a purchaser in a second state is a transaction in interstate commerce, and that the state of origin cannot impose a tax with respect to such a sale. [Footnote omitted.] Likewise, there is general agreement that with respect to this same transaction, the state of destination cannot impose its tax. [Footnote omitted.] * * *."

cases are discussed at greater length at pages 31-5, *infra*.

The present case involves a tax upon sales. Under the decisions of this Court, the determination as to whether or not these sales are interstate sales and within the protection of the commerce clause depends upon whether or not shipment of the goods by the producing seller directly to the buyer from the point of origin outside the buyer's state was contemplated and required. If these sales are interstate sales within this rule, each such sale is an integrated whole and may not be broken down into a succession of local events in an effort to divorce each component event (here the transfer of title and possession, or the making of the contract of sale) from the interstate transaction and to treat it as something purely local and so outside the scope of the commerce clause.

The measure of the tax at bar is the entire gross receipts from the sales, without apportionment to activities or events occurring within the State or City of New York. If, as we maintain, these sales (including as their integral parts the negotiation and execution of the contracts, the transportation of the goods and the transfer of title) are interstate sales and fully within the protection of the commerce clause, then the final question is whether the measure of the tax is such that without the protection of the commerce clause the transactions would be subject to the risk of multiple tax burdens, the aggregate of which would work a discrimination against such transactions, and might even destroy them entirely. As this Court said in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 255:

> "* * * local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic

of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. * * * The multiplication of state taxes measured by the gross receipts from the interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove."

A.

THE SALES HERE INVOLVED ARE TRANSACTIONS IN INTERSTATE COMMERCE; INTERSTATE SHIPMENT WAS CONTEMPLATED, REQUIRED AND MADE.

This is a natural case of interstate commerce, for the transactions here involved constitute a steady stream of bituminous coal flowing daily in large quantities from the natural source of the coal at the seller's mines in Pennsylvania, through New Jersey to the ships and plants of the buyers at New York tidewater. The record shows beyond any shadow of doubt that the interstate character of these transactions, carried on in the same manner without variation for over forty years, was required by the practical necessities of the business, from the standpoint of both the buyer and the seller, and was as far from a device for the avoidance of taxes as anything could be.

The subject matter of each contract was a specified brand of coal (either Berwind's Eureka or Berwind's C Prime) to be produced by respondent from its

mines in Pennsylvania, the only source of such coal (R. 28-9, 46-7; Appendix A, pp. 59 *et seq., infra*). The parties contracted for these particular brands of coal, to be shipped from their source by the producer. All the coal was delivered by shipment direct from the mines and all deliveries made in New York City were made by shipment on board cars over the Pennsylvania Railroad to Harsimus Pier, Jersey City, and from there by barge to the purchasers' plants or steamships in New York City (R. 30-2, 63-5).

The coal was appropriated to the contracts outside New York State because it was mined upon specific orders only (R. 62, 63); it was specifically identified by waybills when loaded on board cars at the mines (R. 64); and when it was transferred from the cars to the barges at Jersey City each barge was consigned and delivered to a particular customer pursuant to a particular order, the bill of lading designating the customer as consignee (R. 64-5; Exhibit 41, R. 145). All such deliveries were complete when the barges came alongside the plants or steamships (R. 65). All such deliveries necessarily involved continuous transportation of the coal across state lines from the mines to the point of destination, and the coal did not come to rest in New York until after delivery to the purchaser was made, that is, when the barge came alongside the purchaser's plant or steamship.

It plainly appears from the record that delivery of the coal by shipment from the mines was contemplated by all the purchasers (R. 74, 88, 92-3, 97-8). The facts with respect to the course of dealing between respondent and its customers leave no room for doubt on this point. The character of respondent's business as a coal producer, the fact that the source of coal

sold was localized in Pennsylvania, the needs of the purchasers for daily deliveries of freshly mined coal in large quantities, the fact that respondent has never maintained any storage in New York State, the futility and impracticability of maintaining any such storage in meeting the extensive needs of its purchasers, the special delivery facilities maintained by respondent for the past forty years for the specific purpose of making deliveries directly from the mines, and the consistent practice of respondent over the past forty years of making deliveries from the mines—all these factors conclusively establish that delivery of the coal by shipment from the mines was not only the invariable course of dealing between the parties, but was the only course that could be followed for all practical purposes (R. 27-32, 68-72, 90-1).

The facts with respect to source and delivery of the coal were well known to the purchasers when the contracts were made. It was known that the coal which was the subject matter of each contract (either Berwind's Eureka or Berwind's C Prime) was obtainable only from respondent's mines in Pennsylvania (R. 46-7, 78). Indeed, most of the contracts expressly stipulated the source of the coal as the mines of respondent in Pennsylvania, and some went so far as to specify particular mines by name or number (Appendix A, pp. 59 *et seq.*, *infra*). The purchasers were informed that respondent did not maintain storage in New York, that it had delivery facilities for delivery of the coal directly from the mines, and that its practice was to make delivery from the mines through the medium of such facilities (R. 31, 47). This practice was of importance to the purchasers, particularly the public utility companies which required daily deliveries of freshly

mined coal in large quantities. The Purchasing Agent for the New York Edison Company, when asked whether respondent's delivery facilities and delivery practice had any bearing on his negotiation of contracts for the purchase of coal from respondent, testified, "That is the reason we continue to do business with them" (R. 77). Shipment from the mines was not only contemplated but was required. The contracts also fully confirm this fact (Appendix A, pp. 59 *et seq.*, *infra*).

The foregoing facts sufficiently distinguish the present case from cases like *Ware and Leland* v. *Mobile County*, 209 U. S. 405; *Banker Brothers Co.* v. *Pennsylvania*, 222 U. S. 210; *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169, and *Graybar Electric Co.* v. *Curry*, 189 So. 186, affirmed November 6, 1939 on the authority of *Banker Brothers Co.* v. *Pennsylvania*, *supra*, and *Wiloil Corp.* v. *Pennsylvania*, *supra*. Petitioner apparently concedes that these cases are distinguishable, for he does not argue that they are controlling.

In the *Ware and Leland* case, *supra*, this Court upheld the application to a local brokerage firm in Alabama of an annual license tax on the business of buying and selling futures for speculation or on commission. As to those future contracts which were merely speculative and were not followed by actual delivery, the court held that the contracts were not the subject of interstate commerce. As to those contracts which actually resulted in delivery, the seller was at liberty to acquire the goods where he pleased, that is, in the market where the delivery was required or elsewhere. For these reasons the court held that the commerce clause did not apply, saying (p. 413):

> "In neither class of contracts, for sale or purchase, was there necessarily any movement of

commodities in interstate traffic because of the contracts made by the brokers. * * * The delivery, when one was made, was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce."

In distinguishing cases like *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Rearick* v. *Pennsylvania*, 203 U. S. 507, and *Caldwell* v. *North Carolina*, 187 U. S. 622, the Court said (p. 412):

"In these cases goods in a foreign State are sold upon orders for the purpose of bringing them to the State which undertakes to tax them, and the transactions are held to be interstate commerce, because the subject-matter of the dealing is goods to be shipped in interstate commerce; to be carried between States and delivered from vendor to purchaser by means of interstate carriage."

In *Banker Brothers Co.* v. *Pennsylvania*, 222 U. S. 210, the tax involved was a tax imposed by Pennsylvania upon retail sales. Banker Brothers were retail automobile dealers in Pittsburgh. The New York manufacturer agreed to build for and sell automobiles to Banker Brothers at a certain percentage under the list price, deliveries to be f.o.b. Buffalo, New York. Banker Brothers made agreements to sell to its customers in Pennsylvania at the list price quoted f.o.b. Buffalo, New York. Thus there were two transactions of sale, one between the manufacturer and Banker Brothers and the other between Banker Brothers and the local purchaser. The automobiles were shipped by the manufacturer directly to Banker Brothers, who made payment to the manufacturer;

and Banker Brothers, receiving the automobiles in Pittsburgh, delivered them in turn to its customers in Pennsylvania. Banker Brothers claimed that the sales to its customers were interstate sales within the protection of the commerce clause. The Court held that the sales were taxable, pointing out that the transactions between Banker Brothers and its customers were wholly intrastate and that the purchaser in Pittsburgh (p. 214) "was not concerned with the question as to how the machine was acquired by his vendor, or whether that company [Banker Brothers] bought it from another dealer in the same city or from the manufacturer in New York."

In *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169, the tax involved was imposed "upon all liquid fuels used or sold and delivered by distributors within" Pennsylvania. The Wiloil Corporation was a local corporation engaged in selling liquid fuels at wholesale to consumers in Pennsylvania. It obtained the fuels covered by its contracts from another company located in Wilmington, Delaware. The fuels were sold at a specified price "f.o.b. Wilmington, Del." and were shipped from Wilmington directly to the buyers in Pennsylvania. As in the *Banker Brothers* case, there were two transactions of sale, namely, one between the company in Wilmington and Wiloil Corporation, and the other between Wiloil Corporation and its customers; and the tax was laid upon the local sale by Wiloil Corporation to its customers. In holding that these sales were not interstate sales, the Court said (pp. 173-5):

> "Appellant was not required by the contracts to obtain the fuels at Wilmington but was free to effect performance by shipping from any place within or without Pennsylvania. It is the practice in appellant's business to sell f.o.b. at a specified place in order to fix the price, and such

billing may be merely price-fixing and not an indication of the source or place of shipment.

* * * * * * *

"These contracts did not require or necessarily involve transportation across the state boundary.

* * * * * * *

"* * *. As interstate transportation was not required or contemplated, it may be deemed as merely incidental. Cf. *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593, 604. *Ware & Leland* v. *Mobile County*, 209 U. S. 405, 412-413. The act lays no burden on interstate commerce as such, and if any can be said to result from the imposition, it is indirect and precisely as that which would have resulted if deliveries had been made exclusively by intrastate transportation from Pennsylvania sources."

In *Graybar Electric Co.* v. *Curry*, 189 So. 186, affirmed 308 U. S. —, 84 L. Ed. 97, the tax involved was imposed upon the business of selling tangible personal property at retail and was measured by 2% of the gross receipts. The Graybar Company was a dealer or jobber in electrical supplies with a branch office in Birmingham, Alabama. It was engaged in purchasing electrical supplies from manufacturers and selling them to consumers in Alabama. It had one warehouse in Birmingham and another in Atlanta, Georgia, where it kept certain articles of its stock in trade. There were two methods of filling orders of its customers in Alabama, namely, (1) by shipment from its warehouse in Atlanta and (2) by having the manufacturer (General Electric Company) ship from its plant in Ohio directly to the customer. In the latter class of cases it purchased the supplies from the manufacturer under one contract and sold them to its customers under a separate contract with the

customer. Some of these latter contracts contained the provision that "the material covered by this contract shall be manufactured at the plant of the General Electric Company located in the State of Ohio and shipped in interstate movement from said plant to destination". Others of these contracts did not contain any provision with regard to the source of the goods. The court held that none of the sales by the Graybar Company were interstate sales entitled to the protection of the commerce clause, saying (189 So. 186, 190):

> "The means by which, and the place from which, the complainant obtained the goods to fulfill its contract were but incidents in the transaction, and cannot serve to change the status of the transactions. The consumers had no dealings with the nonresident manufacturers. Their contracts were with the complainant in Alabama for the sale and delivery of the goods to them in Alabama."

With respect to the contracts which specified "interstate movement" the court said (p. 190):

> "It was no benefit to the purchasers that the goods were to be shipped 'in interstate movement' for the reason that the price of the goods would be the same, whether shipped 'in interstate movement' or not. Evidently this provision as to 'interstate movement' was to preclude, if possible, the imposition of a sales tax on the goods in Alabama. The transactions were Alabama sales within the provision of the Alabama Sales Tax Law. The form or language of the customers' orders cannot affect the case."

On the point of the form of the orders, the court referred to *Superior Oil Co. v. State of Mississippi*, 280 U. S. 390, in which a similar attempt artificially to create an interstate transaction had been made. In

that case Mr. Justice Holmes indicated the distinction between an artificial and a real interstate transaction when he said (p. 396):

> "It is a matter of proximity and degree as to which minds will differ, but it seems to us that the connection of the seller with the steps taken by the buyer after the sale was too remote to save the seller from the tax. Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here."

The distinction between all these cases and the case at bar is plain. The present case is one in which the purchaser requires a special brand of coal, in large quantities, the only source of which is the producer's own mines in Pennsylvania. The producer sells directly to the consumers in circumstances which, as a matter of practical necessity both from the standpoint of the producing seller and the purchaser, require the shipment of the coal from the seller's mines directly to the purchaser. Here there is only one transaction; namely, the interstate sale; this is not a case of a dealer who buys outside the state and sells locally. Here there is nothing artificial in the interstate character of the transaction; the interstate character of the transaction is the essence of it. This is the very case which Mr. Justice Holmes in the *Superior Oil Co.* case had in mind, for here interstate movement of the coal is a "manifest certainty" and it is necessary as a matter of policy that the movement of this constant stream of coal from Pennsylvania to New York be protected under the commerce clause against the imposition of discriminatory and destructive tax burdens.

B.

THE EVENT UPON WHICH THE TAX IS LAID IS AN INSEPARABLE PART OF AN INTEGRATED INTERSTATE TRANSACTION.

Local Law No. 20 as amended by No. 24 imposes a tax of 2%, "upon the amount of the receipts from every sale in the city of New York", defining the word "sale" as meaning "any transfer of title or possession or both * * * for a consideration, or any agreement therefor". Thus in respect of the sales in the present case, which were completed by delivery in New York City, there are two events upon which the tax, if valid, would be laid, namely, the making of the contract of sale and the transfer of title and possession. In respect of the sales which were completed by delivery outside New York, the only event occurring in New York City was the making of the contract.

It is obvious that shipment, transportation and delivery of the coal to the purchaser at destination are all part of the interstate transaction. Shipment and transportation across state lines are the essence of interstate commerce and the delivery and transfer of title to the purchaser at the terminus cannot be divorced from the transportation and treated as a purely local activity, for it is physically a part of the transportation of the goods. Here the deliveries were complete and title passed to the purchasers only when respondent's barges came alongside the purchasers' plants or steamships; unloading was done by the purchasers (R. 65, 76).

The case of *Puget Sound Stevedoring Co.* v. *State Tax Commission*, 302 U. S. 90, establishes that the delivery and transfer of title in the present case is well within the protection of the commerce clause.

The tax there involved was imposed for the privilege of engaging in business within the state measured by a specified percentage of gross receipts. The taxpayer was engaged in the business of loading and unloading vessels plying exclusively in interstate and foreign commerce. It was held that the loading and unloading of these vessels was an inseparable part of such commerce. The Court said (p. 94):

> "The business of loading and unloading being interstate or foreign commerce, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling."

Petitioner seeks to justify the tax in the present case upon the ground (p. 43) that the transfer of possession and title to the purchaser is "essentially a local event". But if, as this Court held in the *Puget Sound* case, the unloading is an integral part of interstate commerce and within the protection of the commerce clause, there can be no doubt that the delivery of title and possession, the event which precedes the unloading as a part of the interstate movement, is also interstate commerce within the protection of the commerce clause.

Since the negotiation and execution of the contract of sale are indispensable incidents of the interstate sale, these activities are necessarily within the field of protection afforded by the commerce clause. *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 437; *Real-Silk Hosiery Mills* v. *Portland*, 268 U. S. 325; *Davis* v. *Virginia*, 236 U. S. 697; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Brennan* v. *Titusville*, 153 U. S. 289; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489. See *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 311.

In *Real Silk Hosiery Mills* v. *Portland*, *supra*, this Court said (p. 335), quoting with approval *Robbins* v. *Shelby County Taxing District*, *supra* (p. 497):

> "The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce."

And in *Gwin, White & Prince, Inc.* v. *Henneford*, *supra* (p. 437):

> "We need not stop to consider which, if any, of appellant's activities in carrying on its business are in themselves transportation of the fruit in interstate or foreign commerce. For the entire service for which the compensation is paid is in aid of the shipment and sale of merchandise in that commerce. Such services are within the protection of the commerce clause, *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Real Silk Mills* v. *Portland*, 268 U. S. 325; and the only question is whether the taxation of appellant's gross receipts derived from them is such an interference with interstate commerce as to bring the tax within the constitutional prohibition."

C.

THE TAX IS INVALID AS AN UNDUE BURDEN UPON INTERSTATE COMMERCE BECAUSE, IF UPHELD, THE INTERSTATE SALES WOULD BE SUBJECT TO THE DANGER OF MULTIPLE AND CUMULATIVE TAX BURDENS TO WHICH LOCAL TRANSACTIONS ARE NOT EXPOSED.

The protection afforded by the commerce clause covers interstate commerce as such, and the commerce

so protected includes all the activities going to make up such commerce. In a case such as this, the commerce is the interstate sale as an integrated whole, namely, the negotiation and execution of the contract of sale, the shipment, transshipment and transportation of the goods and their delivery to the purchaser at destination.

There can be no doubt that the tax here laid upon the transfer of possession and title to the purchasers in completion of interstate sales is a direct burden upon interstate commerce, for it means that such commerce must bear the burden of two cents upon every dollar of receipts from the interstate sales. If this were the only burden to which the sales were exposed, there might be no ground for complaint, for local transactions are subject to the same burden. But here the various activities constituting the integrated interstate transaction occur in three different states, namely, Pennsylvania, New Jersey, and New York, and if the entire interstate transaction were not protected by the commerce clause Pennsylvania and New Jersey could also impose taxes upon the activities within their borders constituting necessary parts of the interstate transaction, and could also measure such taxes by the entire gross receipts. The effect of such multiple burdens would be discriminatory, if not indeed destructive, because local transactions are not exposed to such burdens. *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307. See *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250.

The danger to which these sales would be exposed if they should be deprived of the protection of the commerce clause is readily discernible. If New York City were permitted to single out the transfer of possession or the making of the contract, occurring within its borders, and to treat it as a purely local event

divorced from interstate commerce, and to impose a tax upon it measured by the entire gross receipts from the sale, of which it is an integral part, then Pennsylvania and New Jersey could with equal right single out and treat as purely local events the phases of the interstate transaction which occur within their borders and impose taxes upon those phases of the transaction measured by the same receipts. For example, the act of shipment or delivery to the carrier, occurring in Pennsylvania as the beginning of the interstate transportation, would surely have the same status as a taxable event as would the act of delivery to the purchaser, which is the end of the interstate transportation and occurs in New York. Pennsylvania might impose a general tax upon all deliveries to carriers for shipment, including interstate as well as intrastate shipments. Such a tax, imposed at the rate of 2% upon the gross receipts from or the value of the property shipped, would, as applied to the transactions here involved, result in doubling the burden imposed upon these transactions. Nothing but the commerce clause stands in the way of the imposition of such a tax. (See *Case of the State Freight Tax*, 15 Wall., 232.)

But this is not all. The coal is carried by rail from the mines in Pennsylvania to a pier in New Jersey, where it is transshipped by water to destination. If these transactions were not protected by the commerce clause, New Jersey, by imposing a general tax upon all transshipments, whether interstate or intrastate, measured by the gross receipts from the transactions or the value of the goods transshipped, could impose a third burden upon these transactions. If the tax on delivery to the carrier imposed by Pennsylvania, when added to the tax on delivery to the purchaser imposed by New York, had not already broken the back of this interstate business, the third

tax imposed by New Jersey would certainly be the *coup de grace*, because competing fuels sold locally in New York would not be exposed to such burdens.

The danger of the imposition of these discriminatory burdens is an intensely real and practical one. It cannot be brushed aside by the mere statement that each of the taxes suggested is upon a different event and that each event is peculiarly local to the jurisdiction in which it occurs; nor is the danger any different whether the person who is required to pay the tax is the buyer or the seller. The doctrine that interstate transactions must be kept free from the danger of multiple and cumulative burdens imposed by different states would be meaningless if it were limited in its application to multiple taxes upon the same component event and the same person. The due process clause prohibits one state from imposing a tax upon an event which occurs in another state or upon a person resident in another state; the commerce clause is not necessary to protect the transactions in that respect. The commerce clause permits wide scope in the imposition of local taxes, but when there is a danger that local taxes may be imposed by more than one state upon different phases of an integrated interstate transaction then the fact that such taxes will become cumulative burdens upon the transaction and thus create trade barriers between the states or destroy the commerce entirely makes it absolutely necessary to bring the commerce clause into play.

Petitioner, in arguing that there can be no "multiple taxation" here, misconceives the rule which protects interstate transactions from exposure to multiple tax burdens. He says (p. 39) that "the moment at which interstate commerce begins or ends is important not for its own sake so much as because it forms a convenient test for determining whether or

not the tax is of such a nature that it can be imposed in every state which the commerce touches", and that "the ultimate question to be determined is not whether the commerce has commenced or ended, but whether the tax is one which can be imposed in more than one State." His conception of the rule, or as he calls it, the "doctrine of multiple taxation" (p. 40), is that protection is limited to a prohibition of multiple levies by different states upon the same local event and against the same person. But obviously this cannot be the meaning of the rule; as petitioner himself points out (p. 44), the due process clause forbids one state to tax an event occurring in another state and limits the classes of persons who may be taxed by a state to persons resident, doing business or having property within the state. These limitations are in themselves sufficient to eliminate the possibility of "multiple taxation" in the sense in which petitioner uses that term. But, as this Court has held in the *Adams Mfg. Co.* and *Gwin, White* cases, interstate transactions are not sufficiently protected by these limitations of the due process clause; they must have further protection under the commerce clause for the obvious reason that in the course of an interstate transaction moving through two or more states there will occur in each state an event or events within the power of the state to tax under the due process clause, and in each state there will be persons participating in the transaction whom that state has jurisdiction to tax. If the states should be permitted fully to exercise their taxing powers without restriction by the commerce clause, the interstate transactions would be exposed to multiple tax burdens. It is obvious that the sum of such burdens, if imposed, would be discriminatory.

Petitioner argues that the tax, if upheld, would not expose the transactions to discriminatory bur-

dens because the person liable for the tax is not the vendor but the purchaser. Whether the tax is payable by the buyer[1] or the seller[2] or the carrier[3] or the stevedore[4] is unimportant; at all events the economic burden upon the transaction is the same, since the amount of the tax will be reflected either in an increased cost of the goods to the buyer or a decreased profit to the seller. The triple tax burden, if permitted to be imposed upon the interstate sales here involved, would in effect be an insuperable trade barrier erected in direct contravention of the spirit and purpose of the commerce clause.

Petitioner further argues that a tax upon a purchaser-consumer is not a tax upon interstate commerce, because the purchaser for consumption is not engaged in interstate commerce. The business in which the purchaser is engaged is quite immaterial, as this is not a tax upon his business but upon an interstate transaction in which he participates. The question here is whether the tax, if upheld, would result in exposing the interstate transaction to multiple burdens. What the purchaser's activities are, apart from his participation in the interstate transaction, has no bearing upon that question, for those activities occur after the interstate sale is completed. If the nature of the purchaser's business were material we might point out that among the purchasers from the respondent are a number of steamship companies all of whom are engaged in interstate and foreign commerce and immediately use the coal purchased as fuel upon their ships. But

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[1] See *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 260-1.

[2] *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307.

[3] *Case of the State Freight Tax*, 15 Wall. 232.

[4] *Puget Sound Stevedoring Co.* v. *State Tax Commission*, 302 U. S. 90.

we do not press this point because, as this Court said in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 441:

> "For half a century following the decision in *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, it has not been doubted that state taxation of local participation in interstate commerce, measured by the entire volume of the commerce, is '* * * foreclosed.'"

And in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 260-1, this Court, referring to *Fisher's Blend Station, Inc.* v. *State Tax Commission*, 297 U. S. 650, said:

> "There the exaction was a privilege tax laid upon the occupation of broadcasting, which the Court held was itself interstate communication, comparable to that carried on by the telegraph and the telephone, and was measured by the gross receipts derived from that commerce. If broadcasting could be taxed, so also could reception. *Station WBT, Inc.* v. *Poulnot*, 46 F. (2d) 671. In that event a cumulative tax burden would be imposed on interstate communication such as might ensue if gross receipts from interstate transportation could be taxed. This was the vice of the tax of a percentage of the gross receipts from goods sold by a wholesaler in interstate commerce, held invalid in *Crew Levick Co.* v. *Pennsylvania*, *supra*. In form and in substance the tax was thought not to be one for the privilege of doing a local business separable from interstate commerce."

In any event, the tax at bar has been assessed against and collected from respondent as vendor, and respondent is unquestionably engaged in interstate commerce. Although petitioner refers to respondent throughout his brief as "the taxpayer" he says in

the same breath (p. 43) that "The taxpayer is not the seller but the local purchaser." Whatever words are used by petitioner to describe the liability asserted against respondent here, it is quite clear under the decisions of the New York courts that the liability so asserted is a real liability for taxes; and if respondent does not prevail in this litigation, it will be out-of-pocket to the extent that it is not able to collect from the purchasers. *Matter of Atlas Television Co.*, 273 N. Y. 51; *New York City* v. *Goldstein*, 299 U. S. 522, reversing *In re Lazaroff*, 84 F. (2d) 982, on the authority of the *Atlas* case.

Petitioner argues that the tax is not a burden upon interstate commerce because it applies equally to all sales in the state and (p. 17) "The purchaser pays the same tax upon goods produced by his local neighbor as he does upon goods brought from across the continent." Of course the tax is not a burden in this sense. But this wholly ignores the rule against subjecting interstate sales to the danger of multiple burdens. If, as petitioner suggests, the goods were brought from California to New York, twelve or more states through which the goods passed could exact multiple tribute from the transactions unless they were protected by the commerce clause. This Court has always regarded the necessity of protecting interstate commerce from that danger as paramount and has repeatedly held that where that danger exists the tax is invalid under the commerce clause even though it is general and nondiscriminatory in terms. In *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 312, this Court said:

> "The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction but it is settled that this will not save the tax if it directly burdens interstate commerce."

Other cases to the same effect are *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292; *Case of the State Freight Tax*, 15 Wall. 232, 276-7; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 497.

Petitioner, on page 16, refers to *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466 (the recent decision of this Court upholding a state income tax upon the salary of an employee of a federal instrumentality), and seeks to draw a parallel between the question of burden in that case and the question of burden here. Therein lies the fundamental fallacy of petitioner's whole argument in this case. In the immunity cases like the *Graves* case there is only one taxing government involved, and the question is whether the tax imposed by that government is an undue burden upon or interference with the other government whose employee is subject to the tax. In that case the employee was subjected to no greater or different tax than persons employed by private enterprise, and the burden upon the employing government, to the extent that it existed, was (p. 487) "but the normal incident of the organization within the same territory of two governments, each possessing the taxing power."

The question of burden under the commerce clause is a wholly different question. Interstate commerce involves forty-eight states—forty-eight taxing governments, each with many taxing subdivisions. An interstate transaction necessarily involves at least two states and may involve three states, as here, or possibly as many as twelve or fifteen states. In view of this situation the Court, in framing a rule for the protection of interstate commerce against discrimination and the erection of trade barriers, has never limited itself to the simple question as to whether the tax imposed by any *one* state is imposed alike upon interstate and local commerce. A rule drawn

upon such a narrow ground would certainly result in the imposition of discriminatory multiple burdens upon interstate transactions, for each state which the commerce touches could satisfy the requirement of such a rule by imposing taxes upon interstate and local transactions alike, with the result that the local transactions would be subject to a single burden while the interstate transactions would be subject to from two to fifteen identical burdens depending upon how many states exacted what each would call a "non-discriminatory" tax.

It might be suggested that the power to impose "non-discriminatory" taxes upon the activities constituting an integrated interstate sale be limited to one state—the state of destination, for if so, such sales would be on a parity with local sales and there would be no multiplicity of burden. However, such a rule would violate the fundamental right of each state in the Union to receive equal treatment under the Constitution. To allow the state of destination to impose a tax upon activities occurring within its borders which are integral parts of an interstate sale, while at the same time denying an equal right to the states of origin, transshipment and transportation to impose taxes upon the activities occurring within their borders when such activities are part of an integrated interstate sale, would be contrary to this fundamental constitutional requirement of equality, for it would discriminate in favor of one state against the others.

Such a rule would also be in direct conflict with the decisions of this Court in *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, and *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434. In those cases the taxes imposed by the state of origin were held invalid, not because they were imposed by the state

of origin, but because they were measured by the entire gross receipts from the commerce without apportionment to the activities carried on within the taxing state. The principle applied in those cases is that a tax upon interstate transactions may not be imposed by any state if it is measured by entire gross receipts, but may be imposed only if the measure of the tax is a fair proportion of the gross receipts allocated to the activities carried on within the state. This, we believe, is the only principle which will preserve to each state its equal rights and at the same time avoid the imposition upon interstate commerce of discriminatory burdens.

The tax at bar, being measured by entire gross receipts, has precisely the same vice as the taxes involved in the *Adams* and *Gwin, White* cases, and the reasons which resulted in the invalidation of the taxes in those cases are equally applicable here.

In the *Adams* case, this Court said (pp. 311-2):

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, §8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the

exaction, but it is settled that this will not save the tax if it directly burdens interstate commerce."

And in the *Gwin, White* case this Court said (pp. 439-40):

> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed. * * * Such a multiplication of state taxes, each measured by the volume of the commerce, would re-establish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden."

The unsoundness of petitioner's approach to the question of burden is well illustrated by the argument made under Point IV D of his brief at pages 47 *et seq.* The argument there made suggests another form which the discriminatory multiple burdens upon these sales might take.

Pennsylvania is the home state of respondent. It has its main office in Philadelphia and carries on ex-

tensive business in Pennsylvania. The coal is mined and shipped from Pennsylvania; the orders are received in Pennsylvania by transmission from the New York office and the receipts from the sales are transmitted to Philadelphia, where they are deposited. Pennsylvania has the unquestioned power to impose upon respondent an excise tax for the privilege of doing business, including the business of selling coal to New York City purchasers. If such a tax were measured by the entire gross receipts from such sales and were at the same rate as the New York City sales tax, the burden on such sales would be twice the amount of the tax to which local sales in New York City would be subject. Even if the Pennsylvania gross receipts tax were apportioned in accordance with the requirements laid down by this Court in the *Gwin, White* case, the burden would still be greater than that imposed upon local sales in New York City, for the New York City sales tax is upon the entire gross receipts without apportionment.

Petitioner seeks to meet this by pointing out (p. 49) that New York City now imposes a gross receipts tax for the privilege of doing business, the measure of which as applied to interstate vendors is a portion of the gross receipts allocated to New York, and as applied to local vendors is the entire gross receipts. The rate of the tax is 1/10th of 1%†. He concedes (and properly so) that under the rule of the *Adams*

† This New York City tax has been in effect since 1934, having been re-enacted each year. Originally there was no provision for apportionment of receipts from interstate commerce, and such receipts were excluded from the measure of the tax under the Comptroller's regulations and in the return forms. Since the re-enactment of 1938, which occurred after the decision of this Court in the *Western Live Stock* case, the law has required apportionment of such receipts. See Local Laws Nos. 9 of 1934, 17 of 1934 (printed in the official compilation as No. 18), 32 of 1935, 29 of 1936, 22 of 1937, 20 of 1938 and 103 of 1939; New York City Business Tax Regulations, Art. 238.

and *Gwin, White* cases Pennsylvania could not impose such a tax upon entire gross receipts, but would be required to impose it on a portion of the receipts based upon activities within the state. Assuming a proper apportionment by both New York and Pennsylvania, he says that "adding the two proportions, the seller will pay one tax on the full amount of the receipts from the sale, apportioned between the two States", but then he adds, "Quite apart from that, as a totally separate tax, the purchaser will pay a full tax on the purchase of the goods", thus putting the Pennsylvania seller in exactly the same position as the local seller, who pays the New York gross receipts tax on the *full* amount of his local sales, while the purchaser of those goods similarly pays a tax on the same transaction."

The argument contains the seed not only of its own destruction but of the destruction of petitioner's whole position. Petitioner assumes an apportioned gross receipts tax imposed upon the seller by Pennsylvania, in accordance with the rule of the *Adams* and *Gwin, White* cases and argues that the New York City apportioned gross receipts tax, enacted in accordance with the rule of the *Gwin, White* case, brings about equality between Pennsylvania and New York vendors so far as that type of tax is concerned, thus establishing the soundness of the *Gwin, White* principle. He overlooks the obvious fact that if, contrary to the *Gwin, White* principle, both Pennsylvania and New York could and did impose their taxes upon the same sales without apportionment, the desired equality would not exist; Pennsylvania vendors would pay twice as much tax as New York vendors upon their sales to New Yorkers. He then goes on to point out that the New York City sales tax is imposed equally upon sales by Pennsylvania and New York vendors measured by the full amount of the receipts. Again he

overlooks the fact that this is not the equality required by the *Gwin, White* case, for it would be destroyed by the enactment in Pennsylvania or New Jersey or both of a tax or taxes upon these transactions measured as the New York tax is measured, namely, by the entire gross receipts. In other words, as we have said, the vice of the taxes held invalid in the *Adams* and *Gwin, White* cases, is precisely the same as the vice which renders the tax at bar invalid.

II.

The use tax cases are clearly distinguishable from the present case.

As we have pointed out, the tax at bar is in terms, as well as by judicial construction of the New York courts, a tax laid upon the transaction of sale; it is not a tax upon use or ownership by the purchaser after the purchaser has acquired the property. A separate and distinct tax upon such use or ownership is imposed by the City under Local Law No. 25 (printed as Appendix B, pp. 65 *et seq., infra*). We have also shown that the practical effect of upholding the validity of the sales tax as applied to the interstate sales here involved would be to subject them to the danger of discriminatory and destructive multiple tax burdens to which local sales are not exposed.

Petitioner argues that the tax at bar is identical with the California use tax sustained by this Court in *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167; and *Pacific Telephone & Telegraph Co.* v. *Gallagher*, 306 U. S. 182, and that consequently the tax here involved should be sustained. It is true that there are some superficial similarities between the California use tax

and the New York City sales tax, but these taxes fundamentally are different in character and purpose.

The use tax is imposed upon "storage, use or other consumption" in California "of tangible personal property purchased from a retailer", "use" being defined as "including the exercise of any right or power over tangible personal property incident to the ownership of that property" except sale of the property in the regular course of business. This language obviously covers the use of property after it has been acquired by the purchaser; it does not cover and was not intended to cover the transaction, or any part of the transaction in which the purchaser acquired the property from the retailer. The New York City property or use tax (Local Law No. 25) is identical with the California use tax in this respect. But the New York City sales tax is imposed upon the transaction of sale, "sale" being defined as "the transfer of title or possession or both * * * for a consideration, or any agreement therefor". Here the tax is clearly imposed upon the transaction by which the purchaser acquires the property; it is not imposed upon the use of the property by the purchaser after the transaction of acquisition is complete.

Petitioner recognizes this difference but says it is merely one of words rather than of substance. The difference is one of real substance, however, because it is a difference in the choice of the thing taxed. As this Court pointed out in *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 177:

> "State taxes upon national commerce or its incidents do not depend for their validity upon a choice of words but *upon the choice of the thing taxed.* * * * The prohibited burden upon commerce between the states is created by state interference with that commerce. * * *. A discrimina-

tion against it, or a tax on its operations as such, is an interference. A tax upon property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate and foreign commerce to the Congress." (Italics ours.)

In arguing that the two taxes are identical petitioner does not say that the New York City sales tax is a use tax; he says that the California use tax is a sales tax. At page 21 of his brief, in referring to the tax involved in *Southern Pacific Co. v. Gallagher*, he says that "the tax was imposed upon the transfer of the property to the railroad company in California." This statement in itself is enough to show the extremely strained character of his argument. How a tax imposed upon "the exercise of any right or power incident to ownership" can be called a tax imposed upon the transaction by which the taxpayer *acquires* ownership is completely beyond our understanding.

California, like New York City, has both a sales tax and a use tax.[1] As in the case of the New York City use tax, the California use tax was enacted as a compensatory tax complementary to its sales tax, and designed to equalize taxation in cases where the sales tax could not reach the transactions, such as sales occurring or originating outside the state or interstate sales protected under the commerce clause.

[1] The California sales tax was enacted July 31, 1933 as Chapter 1020 of the Statutes of California, 1933; the California use tax was enacted June 25, 1935 as Chapter 361 of the Statutes of California, 1935 and amended by Chapters 401, 671 and 683 of the Statutes of California, 1937.

The New York City use tax is designed to fulfill the same function in New York City as does the California use tax in California. Indeed, the two taxes are substantially the same in incidence and effect. The New York City sales tax can be no more identified with the California use tax than it can with the New York City use tax. The fact that under the California use tax the so-called "retailer" is required to collect the tax from the person "storing, using or otherwise consuming" the property purchased from the retailer,[1] which amount constitutes a "debt"[2] of the retailer to California, does not vary the character or incidence of the use tax, any more than the fact that the seller is made liable for the New York City sales tax,[3] with a right of action over against the buyer, varies the character or incidence of the sales tax.

The observance of the fundamental distinction between the character and designed purposes of the two taxes as they exist side by side in New York City, as well as in California, is vital to the preservation of interstate commerce, in view of the principles which this Court has laid down in construing the commerce clause. This Court has drawn a clear line between those taxes which can be measured by entire gross receipts or their equivalent and those which cannot. Local activities which are not directly connected with interstate selling, but either precede it or follow it, can be subjected to a tax measured by entire gross receipts. *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459 (manufacturing in the state of origin); *Southern Pacific Co.* v. *Gallagher*, 306

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[1] Sections 3 and 6 of the California use tax.

[2] Section 6 of the California use tax.

[3] *Matter of Atlas Television Co.*, 278 N. Y. 51; *New York City* v. *Goldstein*, 299 U. S. 522, reversing *In re Lazaroff*, 84 F. (2d) 982.

U. S. 167; *Henneford* v. *Silas Mason Co., Inc.*, 300 U. S. 577 (use in the state of destination). But interstate selling, including all parts of the transaction of sale, from the negotiation of the contract to and including its consummation by delivery to the buyer, cannot be subjected to a tax measured by gross receipts without proper apportionment, because if such a tax were valid the interstate sales would be subject to the danger of multiple tax burdens, discriminatory and destructive in effect. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307; *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434.

In the light of this principle, the difference between the New York City sales tax and the New York and California use taxes is of the utmost importance. The New York City sales tax is not a tax upon local use or ownership after the completion of the sale; it is a tax upon the transaction of sale. To sustain its application to interstate sales would open the door to the imposition of multiple burdens upon such sales. If the tax at bar were a tax imposed upon local use or ownership after interstate commerce has ended, as are the New York and California use taxes, it could be sustained without opening that door.

The use tax is designed to equalize the local tax burdens by covering goods purchased in extrastate and interstate transactions, transactions that are beyond the power of the state to reach by a sales tax. As to extrastate sales, such as for example a sale occurring in New Jersey, petitioner would not contend that the sales tax applies, for it would obviously be barred by the limitations of the due process clause as well as of the State Enabling Act. But he argues that the sales tax should nevertheless be applied to interstate sales

in order to accomplish the desired equality of burden as between these and local sales. What he overlooks is that this supposed equality is merely superficial; if the sales tax were applied to interstate sales it would in fact inevitably result in inequality as between local and interstate sales on account of the resulting additional tax burdens to which the interstate sales alone would be exposed in other states. This resulting inequality is the very basis of the decisions of this Court under the commerce clause. The use tax is the only tax that actually produces the desired equality among local, interstate and extrastate sales.

In the use tax cases, as well as in the *Western Live Stock*, *Adams Mfg. Co.* and *Gwin, White* cases, this Court undertook to draw with clarity and care the line between what is and what is not an unconstitutional burden upon interstate commerce. In arguing that the use tax cases are controlling here, petitioner is really asking the Court to redraw that line so as to subject to local taxation and to the danger of discriminatory burdens, transactions which are unquestionably interstate in character. This plea is placed upon three grounds, namely (1) the urgent need of the City for revenue for unemployment relief, (2) the need for preventing discrimination against local commerce in favor of interstate commerce, and (3) the need for preventing tax avoidance by the use of the protective cloak of the commerce clause.†

The principles laid down by this Court in interpreting the commerce clause have been established

† So far as the question of tax avoidance is concerned there is not the slightest basis for suggesting it in the present case. On the question of tax avoidance generally the governing principles are those applied in cases like *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, and *Graybar Electric Co.* v. *Curry*, 189 So. 186, affirmed 308 U. S.— , 84 L. Ed. 97 (Nov. 6, 1939). But aside from these principles the New York City use tax or a tax like the California use tax would adequately take care of that problem.

with all these factors in full view, and the way is clearly open to the City to accomplish all these objectives without challenging well-established principles. All these objectives may be more readily accomplished by the enforcement of the existing New York City property or use tax; and if the City regards the statute in its present form as inadequate, there is nothing to prevent its modification to conform to the California use tax. The revenue needs of the City, the need for preventing discrimination against local commerce, and the need for preventing tax avoidance are precisely the needs which the California use tax fully meets; and the New York City use tax is ready at hand to meet the same needs. The "practical, social and economic" questions posed by petitioner are really moot here because they may be more readily solved by the proper exercise of the City's present taxing powers under an existing statute without the necessity of enlarging those powers by overriding well-established constitutional principles.

Conclusion.

It is respectfully submitted that the judgment of the Court below should be affirmed; but in the event of an adverse decision upon the federal question here involved the case should be remanded to the New York Court of Appeals for consideration of the question as to the application of the New York State Enabling Act to those sales which were consummated by delivery outside the City of New York.

Respectfully submitted.

JOHN W. DAVIS,
MONTGOMERY B. ANGELL,
MARVIN LYONS,
Attorneys for Respondent.

APPENDIX A.

Summary of Pertinent Provisions of the Contracts Here Involved.

The record shows the terms of all the contracts covering sales to the 20 purchasers here involved during the period December 10, 1934 to December 31, 1935, but by stipulation between counsel and order of the Appellate Division many of these contracts have been omitted from the printed record because they are similar to others that are printed (R. 146-7). A summary of their pertinent provisions follows.

Public Utility Companies.

The New York Edison Company and United Electric Light & Power Company (Exhibit 12, R. 122-5; Exhibits 13-16 not printed).

The pertinent provisions of the contracts with these two companies are substantially identical in terms. The subject matter was "Standard Eureka run of mine B seam * * * bituminous coals *from the Seller's mines in Cambria and Somerset Counties, Pennsylvania*"† (R. 122). The coal was to be delivered alongside the Buyer's power stations. The Seller was "to furnish the Buyer a statement of the numbers of the railroad cars that go to make up each boat cargo, the size of coal contained in each car and *the mine from which it was shipped*" (R. 125). The coal was referred to as coal "to be delivered hereunder *from the above mines*" (R. 124). The prices agreed upon were stated to be "based on the present rates of Wages paid to miners and day laborers *at the above mine or mines of the Seller* and upon the present railroad freight rates *from these mines* to New York Tidewater", and provision was made for an adjustment in price in the exent of change in the wage rates or railroad freight rates (R. 124).

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† Italics ours in all contract excerpts.

Williamsburgh Power Plant Corporation (Exhibit 19, R. 127-30; Exhibit 20, not printed).

The subject matter of these contracts was "Berwind's Standard Eureka Run of Mine ('B' Seam) Coal *from the Seller's Mines*, located in Cambria and Somerset Counties, Pennsylvania", and the mines were designated as "Eureka Nos. 35, 36, 37, 40, 42 and Maryland Shaft Mine, owned and operated by The Berwind-White Coal Mining Company" (R. 128). The coal was to be delivered alongside the Williamsburgh Power Station, Brooklyn, New York. Provision was made for adjustment in the price upon any change in "the present railroad freight rates", the rate from the mines to Harsimus Pier for transshipment by water, fixed by the Interstate Commerce Commission (R. 129; *cf.* R. 58). Price adjustments were also required in the event of a change in wage rates "of mine employees in the district in which *the mines from which the said coal is shipped* are located" (R. 129).

Brooklyn Edison Company (Exhibit 17, R. 126-7; Exhibit 18 not printed).

These contracts called for delivery of "Berwind's Standard Eureka run of mine coal *from the Eureka mines located in Cambria and Somerset Counties at or near Windber, Pennsylvania*". Delivery was to be made alongside the Buyer's power stations (R. 126). The usual provision was made for an adjustment in price in the event of changes in existing wages and freight rates. All settlements with respect to weight of the coal were to be governed by the "Net weights, as determined by the railroad scales nearest loading point" (R. 126).

Interborough Rapid Transit Company (Exhibits 5-10, R. 110-21; Exhibit 11 not printed).

Each of the two formal contracts was preceded by a bid by respondent and an acceptance of the bid by Interborough. The invitation to bid stated that "Bids must be accompanied by an average or typical analysis of the coal proposed to be furnished, and must also specify the name of the producing mine, its location, latest yearly output, shipping point and route to New York" (R. 110). The bid submitted by respondent preceding the contract covering the period from April 1, 1934 to March 31, 1935 stated the subject matter as "Berwind's Eureka" coal (R. 111), accompanied by an analysis (R. 112); the source as "Mines Nos. 35, 36, 37, 40, 42 and Maryland Shaft, located at Windber, Somerset County, Pennsylvania" (R. 112); and the delivery conditions as similar to last year (R. 111), which meant "shipped from our mines in our own railway cars to Harsimus Pier, Jersey City, put into our barges and delivered alongside plant" (R. 33). This bid was accepted (R. 112-3). A similar bid and acceptance preceded the contract covering the periods from April 1, 1935, to March 31, 1936 (Exs. 9 and 10, R. 120-1). The formal contracts designated the coal as "Interborough Standard 'A' coal" (R. 113) and set forth a specific analysis (R. 117), the requirements of which are met by Berwind's Eureka coal (R. 34). The contracts stated that delivery was to be made free alongside Buyer's power stations (R. 115). They also contained certain provisions to provide for "contingencies or causes restricting the production or *shipment from the Seller's mines*" (R. 114), and provided for adjustment in price in the event of any increase or decrease in the railroad rates and vessel rates "for or in respect of *movement from mines*" to Buyer's power stations (R. 115-6). Weights were to be determined by "Vessel's bill-of-lading weight, as determined by Railroad Company over whose piers coal is dumped" (R. 116).

Steamship Companies.

All America Cables, Inc. and Others†
(Exhibit 27, R. 140-2; Exhibits 28-38 not printed).

The contracts with all the steamship companies listed in the footnote† were identical in form (Ex. 27, R. 140-2). Respondent was to supply during a period of one year "all the Bunker Coal normally required" for the use of Buyers' steamers. Delivery was to be made in New York harbor and other ports on the Atlantic seaboard. Only deliveries in New York harbor are here involved. With respect thereto the subject matter of all the contracts was "Berwind's Standard Eureka" coal, and the place of delivery was alongside steamer at her dock within harbor limits (R. 141). The price of the coal was to be subject "to any increase or decrease in Railway rates, or mining costs including adjustments in wages" (R. 142). This refers to the railroad freight rates fixed by the Interstate Commerce Commission for shipments from respondent's mines to Harsimus Pier, Jersey City, and the wages of miners at respondent's mines (R. 58).

Ocean Dominion Steamship Corporation (Exhibit 39, R. 143).

This contract provided that respondent was to supply the Buyer's "bunker requirements at the best prices and terms available to other steamship operators under annual contract or otherwise", deliveries to be made at New York and other ports. The coal delivered under this contract to the Buyer's steamers in New York harbor was Berwind's Eureka coal from respondent's mines in Pennsylvania, and it was delivered in accordance with the usual practice (R. 59-60).

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† All America Cables, Inc., Clyde-Mallory Lines, Compagnie Generale Transatlantique (French Line), International Mercantile Marine Company, New York & Porto Rico Steamship Company, Compania Transatlantique (Spanish Line).

North Atlantic & Gulf Steamship Company; Pioneer Terminal Corporation; U. S. Navigation Company (R. 58-9); Caddell Drydock & Repair Company (R. 50-1).

All coal for these companies during the period from December 10, 1934 to December 31, 1935 was delivered pursuant to spot contracts made orally. These contracts required the delivery of Eureka coal from respondent's mines alongside the Buyer's steamers in accordance with the usual delivery practice, and the coal was so delivered (R. 47-8).

New England Steamship Company (Exhibit 21, R. 130-1).

The coal delivered to this company by respondent during the period December 10, 1934 to December 31, 1935 was delivered pursuant to a written contract up to March 31, 1935 (Ex. 21, R. 130-1), and from April 1, 1935 to December 31, 1935 deliveries were made on a "spot basis" and "as a continuation of the contract expiring March 31", 1935 (R. 51). The written contract required delivery of a certain quantity of Berwind's Eureka run-of-mine coal "to be made to the New England Steamship Company at Harsimus Pier, Jersey City, N. J., in approximately equal monthly quantities" (R. 131). The usual provisions with respect to adjustment of the price in the event of an increase in wages at respondent's mines and changes in freight rates were included (R. 130-1). All deliveries to New England Steamship Company were made at Harsimus Pier, Jersey City, pursuant to these contracts (R. 44).

Industrial Companies.

Arbuckle Brothers (Exhibit 22, R. 131-4).

The subject matter was Berwind's C-prime coal from specified mines of respondent located in Somerset County,

Pennsylvania (R. 132, 49). Deliveries were required to be made in barges, alongside Buyer's plant at Adams Street, Brooklyn, New York (R. 132). Provision was made for adjustment in price on account of increase or decrease in the wages of mine employees in the district "in which *the mine or mines of the producer, from which the coal is shipped*, are located" (R. 133). Deliveries were made pursuant to the contract (R. 97).

L. A. Dreyfus Company (Exhibits 23 and 24, R. 134-9).

Under its contracts L. A. Dreyfus Company had the option to buy either Berwind's Eureka or Berwind's C-prime coal. All its purchases during the period here involved were of Berwind's C-prime coal (R. 49). The contracts were for a specified tonnage "less such amount as [respondent] is unable to ship * * * on account of any strike, accident, contingency of transportation, or cause or causes beyond the control of either party, affecting the *mining, shipment, transportation*, delivery or receipt of coal to be shipped under this agreement" (R. 134-5). Provision was made for adjustment in price in the event "of a general increase or decrease in wages in *the district in which the mine or mines of the producer, from which the coal is shipped*, are located" (R. 135). Shipments were required to be made to the Buyer at "Rosebank, Staten Island, New York, alongside docks within the harbor limits of New York" (R. 136). Deliveries were made pursuant to the contracts (R. 97-8).

Austin, Nichols & Co., Inc. (Exhibits 25 and 26, R. 139-40).

All sales to Austin, Nichols & Co. during the period in question were made pursuant to spot contracts requiring delivery of the coal to the Buyer on board cars at respondent's mines in Pennsylvania. All deliveries were to be made on board cars at the mines in Pennsylvania (R. 140-1), and were so made (R. 53).

APPENDIX B.

Local Law No. 25 of 1934 as Amended by Local Law No. 13 of 1935.†

A local law to amend local law number twenty-five of the year nineteen hundred and thirty-four to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health by the imposition of a tax upon certain personal property situated or owned within the city of New York.

Became a law May 11, 1935, with the approval of the Mayor. Passed by the local legislative body of the city of New York.

Be it enacted by the municipal assembly of the city of New York as follows:

Section 1. IMPOSITION OF TAX. During the period commencing on January first, nineteen hundred and thirty-five, and ending on December thirty-first, nineteen hundred and thirty-five, there shall be paid by the owner a tax of two per centum upon the value of the following-named articles of personal property situated or owned within the city of New York.

(a) Furs and fur products.

(b) Radios, automatic sound and musical reproduction devices, and all other musical instruments of any kind whatsoever.

(c) Automobiles, motor trucks, buses, airplanes, motor boats or any other type of motor vehicle or any part or parts for the same.

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† Printed as No. 26 in the official compilation entitled "Local Laws of the Cities in the State of New York enacted during the year 1934".

(d) Building materials, including all products or materials designed to be used or actually used for the affixation to or improvement of real property, including all materials accessory to such affixation or improvement such as pipes, conduits or any item or material used in any manner in building construction or in the improvement of real property within the city of New York.

(e) Machinery of every type and variety, including typewriters and all other business machinery and refrigerators and all other machinery or mechanical equipment for domestic use.

(f) Furniture and interior furnishings of every type and variety, including all objects used for the furnishing or decoration of the interior of home, office or commercial buildings.

(g) Jewelry, silverware, precious metals and precious stones.

(h) Glass and glass products.

(i) Paper and paper products.

(j) Food products not for human consumption.

(k) Oil, gas, gasoline and other combustibles.

(l) Wires and cables whether or not for construction purposes or the improvement of realty and other electrical supplies and equipment.

(m) Optical supplies of any nature or description.

§2. EXEMPTIONS. No tax, as imposed by section one of this title, shall be due or payable in any event upon any of the articles enumerated in the said section one, and no return need be made thereon pursuant to the provisions of this law if any of the following conditions be demonstrated to the satisfaction of the comptroller:

(a) That the said article was purchased prior to January first, nineteen hundred and thirty-five.

(b) That the total value of the article or articles purchased is less than one hundred dollars in value, except in the case of building materials and supplies, in which event the exemption of this sub-section shall not be applicable.

(c) That the said article is one upon the receipt from the sale of which a tax has been paid pursuant to the provisions of this law or local law number twenty of nineteen hundred and thirty-four, as amended.

(d) That the said article is a bona fide work of art.

(e) That the said article has been manufactured within the city of New York for sale by the manufacturer upon which sale a tax pursuant to local law number twenty of nineteen hundred and thirty-four, as amended, will be paid; or, that the said article constitutes a part of a dealer's stock and that such purchases are for the necessary requirements of the business within the city of New York and is owned only pending a sale upon which a tax pursuant to local law number twenty of nineteen hundred and thirty-four, as amended, will be paid.

§3. VALUATION. For the purposes of the tax levied by this local law, such articles of personal property as are subject to such tax shall be evaluated for taxing purposes at the actual purchase price, and if such purchase price is not available such valuation shall be made in such manner as the comptroller shall direct.

§4. TIME AT WHICH TAX IS DUE. The tax imposed by this local law shall be due and payable on April fifteenth, nineteen hundred and thirty-five, with respect to property acquired on or before March thirty-first, nineteen hundred and thirty-five; on July fifteenth, nineteen hundred and thirty-five, with respect to property acquired on or before June thirtieth, nineteen hundred and thirty-five; on October fifteenth, nineteen hundred and thirty-five, with respect to property acquired on or before September thirtieth, nineteen hundred and thirty-five; and on January fifteenth,

nineteen hundred and thirty-six, with respect to all other property subject to tax hereunder. In the event that such personal property subject to the tax imposed by this local law shall be destroyed or shall lose its identity by affixation to real estate or otherwise the whole tax imposed by this local law shall be due and payable at the time of such destruction or such loss of identity by affixation or otherwise.

§5. COLLECTION OF THE TAX. The comptroller shall by regulation prescribe a method or methods for the collection of the tax imposed by this local law from the persons liable for the same. Except as otherwise prescribed herein, the owner of such property shall in all cases be liable for the tax herein imposed.

§6. RETURNS. Every owner of personal property subject to the provisions of this local law shall file with the comptroller a return showing the amount of such personal property subject to such tax and the taxes payable thereon. Such return shall be filed on or before the date upon which such tax is due, and if such tax be paid upon the filing of such return, no penalty shall be assessed against such taxpayer.

§7. PAYMENT OF TAXES. In the event that the owner of personal property fails to file a return and pay the tax imposed by this law within the time aforesaid set forth, each prior owner of such personal property subject to such tax whose ownership has been acquired or has extended over such property during the year nineteen hundred and thirty-five, shall be liable for such tax in full, and if the property has been subject to the ownership of several such persons during the year nineteen hundred and thirty-five such liability shall be in inverse order of the order of ownership, and upon default of payment of the tax by any owner subsequent in time the comptroller may proceed against any owner prior in time, unless during the ownership of such prior owner such property was not within the classification of property upon which this tax is imposed.

§8. Determination of Tax by the Comptroller. If a return required by this local law is not filed, or if a return when filed is incorrect or insufficient, the comptroller shall determine the amount of the tax due from such information as he may be able to obtain. The comptroller shall give notice of such determination to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall within thirty days apply to the comptroller for a hearing on such determination and shall deposit the full amount of such tax, with all penalties, with the comptroller, in which case the said determination shall be suspended until after such hearing as the comptroller, or his duly designated representative may grant.

§9. Proceeding to Recover Tax. Whenever any person shall fail to collect and pay over any tax and/or to pay any tax or penalty imposed by this local law as in this local law provided, the corporation counsel shall, upon the request of the comptroller, bring an action to enforce payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant, directed to the sheriff of any county within the city of New York, commanding him to levy upon and sell the real and personal property of such person which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant

is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner. In the discretion of the comptroller a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance, and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the comptroller may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city of New York had recovered judgment therefor and execution thereon had been returned unsatisfied.

§10. General Powers of the Comptroller. In addition to the powers granted to the comptroller in this local law, he is hereby authorized and empowered:

(a) To make, adopt and amend rules and regulations appropriate to the carrying out of this local law and the purposes thereof;

(b) To extend, for cause shown, the time for filing any return for a period not exceeding thirty days; and for cause shown, to remit penalties and interest; and to compromise disputed claims in connection with the taxes hereby imposed;

(c) To assess, revise, readjust and impose the taxes authorized to be imposed under this local law;

(d) To delegate his functions hereunder to a deputy comptroller or other employee or employees of the department of finance of the city of New York.

§11. ADMINISTRATION OF OATHS AND COMPELLING TESTIMONY. The comptroller or his employee duly designated and authorized by the comptroller shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of the powers and duties of the comptroller under this local law. The comptroller shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this local law, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller hereunder.

Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any material matter pending before the comptroller hereunder shall be guilty of a misdemeanor, and punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The officers who serve the comptroller's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided.

§12. PENALTIES. Any person failing to file a return or to pay over any tax to the comptroller within the time required by this local law shall be subject to a penalty of ten per centum of the amount of tax due, plus five per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was

required to be filed or such tax became due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid and disposed of in the same manner as other revenues from this local law. Unpaid penalties may be enforced in the same manner as the tax imposed by this local law.

Any person and any officer of a corporation or copartner filing or causing to be filed any return, certificate, affidavit or statement required or authorized by this local law which is wilfully false and any person who shall fail to file a return as required under this local law, and the officers of any corporation which shall so fail, shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

§13. Disposition of Revenues. All revenues and monies resulting from the imposition of the taxes imposed by this local law shall be paid into the treasury of the city of New York and shall not be credited or deposited in the general fund of the city of New York, but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment, including the repayment of monies borrowed or to be borrowed in anticipation of this tax.

§14. Application; Construction. If any provision of this local law, or the application thereof to any person or circumstances, is held invalid, the remainder of this local law, and the application of such provisions to other persons or circumstances shall not be affected thereby. This local law shall be construed in conformity with chapter eight hundred seventy-three, laws of nineteen hundred and thirty-four, pursuant to which it is enacted.

§15. Effective Date of Local Law. This local law shall take effect immediately.

P. 12, 4,

SUPREME COURT OF THE UNITED STATES.

No. 475.—October Term, 1939.

Joseph D. McGoldrick, Comptroller of the City of New York, Petitioner,
vs.
Berwind-White Coal Mining Company.

On Writ of Certiorari to the Supreme Court of the State of New York.

[January 29, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

The question for decision is whether the New York City tax laid upon sales of goods for consumption, as applied to respondent, infringes the commerce clause of the Federal Constitution.

Upon certiorari to review a determination by the Comptroller of the City of New York that respondent was subject to New York City sales tax in the sum of $176,703, the Appellate Division of the New York Supreme Court held that the taxing statute as applied to respondent does so infringe, 255 App. Div. 961, on the authority of *Matter of National Cash Register Co.* v. *Taylor*, 276 N. Y. 208, cert. den., 303 U. S. 656; *Matter of Compagnie Generale Transatlantique v. McGoldrick*, 279 N. Y. 192. The New York Court of Appeals affirmed without opinion, 281 N. Y. 94, but its amended remittitur declared that the affirmance was upon the sole ground that the taxing statute as applied violated the commerce clause. We granted certiorari December 4, 1939, the question presented being of public importance, upon a petition which challenged the decision of the state court as not in accord with applicable decisions of this Court in *Banker Brothers* v. *Pennsylvania*, 222 U. S. 210; *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169.

Chapter 815 of the New York Laws of 1933, as amended by Chapter 873 of the New York Laws of 1934, authorized the City of New York, for a limited period within which the present tax was laid, "to adopt and amend local laws imposing in . . . [the] city any tax which the legislature has or would have power and authority to impose". It directed that "a tax imposed hereunder shall have application only within the territorial limits" of the city; and that "this Act shall not authorize the imposition of a tax on any

transaction originating and/or consummated outside of the territorial limits of . . . [the] city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits". It required the revenues from the tax to be used exclusively for unemployment relief.

Pursuant to this authority the municipal assembly of the City of New York adopted Local Law No. 24 of 1934 (published as Local Law No. 25), since, annually renewed, which laid a tax upon purchasers for consumption of tangible personal property generally (except foods and drugs furnished on prescription), of utility services in supplying gas, electricity, telephone service, etc., and of meals consumed in restaurants. By § 2 the tax was fixed at "two percentum upon the amount of the receipts from every sale in the City of New York", "sale" being defined by § 1(e) as "any transfer of title or possession, or both . . . in any manner or by any means whatsoever for a consideration or any agreement therefor". Another clause of § 2[1] commands that the tax "shall be paid by the purchaser to the vendor for and on account of the City of New York". By the same clause the vendor, who is authorized to collect the tax, is required to charge it to the purchaser, separately from the sales price; and is made liable, as an insurer, for its payment to the city. By §§ 4 and 5 the vendor is required to keep records and file returns showing the amount of the receipts from sales and the amount of the tax. In event of its nonpayment to the seller the buyer is required, within fifteen days after his purchase, to file a tax return and to pay the tax to the Comptroller who is authorized by § 2 to set up a procedure for the collection of the tax from the purchaser. Purchases for resale are exempt from the tax, and a purchaser who pays the tax and later resells is entitled to a refund.

The ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, for consumption, of tangible personal

1 "Upon each taxable sale or service the tax to be collected shall be stated and charged separately from the sale price or charge for service and shown separately on any record thereof, at the time when the sale is made or evidence of sale issued or employed by the vendor and shall be paid by the purchaser to the vendor, for and on account of the city of New York, and the vendor shall be liable for the collection or the service rendered; and the vendor shall have the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property or service and payable at the time of the sale."

property, and measured by the sales price. Only in event that the seller fails to pay over to the city the tax collected or to charge and collect it as the statute requires, is the burden cast on him. It is conditioned upon events occurring within the state, either transfer of title or possession of the purchased property, or an agreement within the state, "consummated" there, for the transfer of title, or possession. The duty of collecting the tax and paying it over to the Comptroller is imposed on the seller in addition to the duty imposed upon the buyer to pay the tax to the Comptroller when not so collected. Such, in substance, has been the construction of the statute by the state courts. *Matter of Atlas Television Co., Inc.*, 273 N. Y. 51; *Matter of Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113; *Matter of Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293.

Respondent, a Pennsylvania corporation, is engaged in the production of coal of specified grades, said to possess unique qualities, from its mines within that state and in selling it to consumers and dealers. It maintains a sales office in New York City and sells annually to its customers, 1,500,000 tons of its product, of which approximately 1,300,000 tons are delivered by respondent to some twenty public utility and steamship companies. The coal moves by rail from mine to dock in Jersey City, thence in most instances by barge to the point of delivery. All the sales contracts with the New York customers in question were entered into in New York City, and with two exceptions, presently to be considered separately, call for delivery of the coal by respondent by barge, alongside the purchasers' plants or steamships. In many instances the price of the coal was stated to be subject to any increase or decrease of mining costs including wages, and of railroad rates between the mines and the Jersey City terminal to which the coal was to be shipped. All the deliveries, with the exceptions already noted, were made within New York City, and all such are concededly subject to the tax except insofar as it infringes the commerce clause.

Section 8 of the Constitution declares that "Congress shall have power . . . . to regulate commerce with foreign Nations, and among the several States. . . . ." In imposing taxes for state purposes a state is not exercising any power which the Constitution has conferred upon Congress. It is only when the tax operates to regulate commerce between the states or with foreign nations to

an extent which ~~impairs~~ infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations. See *Gibbons* v. *Ogden*, 9 Wheat. 1, 187; *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 185. Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states.[2]

But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax

[2] Despite mechanical or artificial distinctions sometimes taken between the taxes deemed permissible and those condemned, the decisions appear to be predicated on a practical judgment as to the likelihood of the tax being used to place interstate commerce at a competitive disadvantage. See Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227. License taxes requiring a corporation engaged in interstate commerce to pay a fee of a certain percentage of its capital stock have been rejected because of the danger that each state in which the corporation does business may impose a similar tax, measured by its interstate business in all, Western Union v. Kansas, 216 U. S. 1; Atchison, T. & S. F. Ry. Co. v. O'Connor, 223 U. S. 280; Looney v. Crane, 245 U. S. 178; International Paper Co. v. Massachusetts, 246 U. S. 135, and have only been sustained when apportioned to that part of the capital thought to be attributable to an intrastate activity. National Leather Co. v. Massachusetts, 277 U. S. 413; International Shoe Co. v. Shartel, 279 U. S. 429; Ford Motor Co. v. Beauchamp, No. 17, October Term, 1939, decided December 11, 1939. Privilege taxes requiring a percentage of the gross receipts from interstate transportation or from other activities in carrying on the movement of that commerce, which if sustained, could be imposed wherever the interstate activity occurs, have been struck down for similar reasons. Fargo v. Michigan, 121 U. S. 230; Philadelphia & S. Steamship Co. v. Pennsylvania, 122 U. S. 326; Leloup v. Mobile, 127 U. S. 640; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, cf. Gwin, White & Prince v. Henneford, 305 U. S. 434. Fixed-sum license fees, regardless of the amount, for the privilege of carrying on the commerce, have been thought likely to be used to overburden the interstate commerce, McCall v. People, 136 U. S. 104; Crutcher v. Kentucky, 141 U. S. 47; Barrett v. New York, 232 U. S. 14; Texas Transportation & Terminal Co. v. New Orleans, 264 U. S. 150. Taxation of articles in course of their movement in interstate commerce is similarly foreclosed. Case of State Freight Tax, 13 Wall. 232; Champlain Realty Co. v. Brattleboro, 260 U. S. 366; Hughes Bros. Co. v. Minnesota, 272 U. S. 469; Carson Petroleum Co. v. Vial, 279 U. S. 95. See Henderson, The Position of Foreign Corporations in American Constitutional Law, 117; Powell, Indirect Encroachment on Federal Authority by the Taxing Power of the States, 31 Harv. L. Rev. 321, 572, 721, 932; 32 Harv. L. Rev. 234, 374, 634, 902. Lying back of these decisions is the recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state. See Robbins v. Shelby County Taxing District, 120 U. S. 489, 499; South Carolina Highway Dept. v. Barnwell Bros., 303 U. S. 177, 185, Note 2; cf. McCulloch v. Maryland, 4 Wheat. 316; Helvering v. Gerhardt, 304 U. S. 405, 412.

burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, *Western Live Stock* v. *Bureau*, 303 U. S. 250, 254. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress. A tax may be levied on net income wholly derived from interstate commerce.[3] Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited.[4] The like taxation of property, shipped interstate, before its movement begins,[5] or after it ends,[6] is not a forbidden regulation. An excise for the warehousing of merchandise preparatory to its interstate shipment or upon its use,[7] or withdrawal for use,[8] by the consignee after the interstate journey has ended is not precluded. Nor is taxation of a local business or occupation which is separate and distinct from the transportation or intercourse which is interstate commerce, forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by such business, or is prerequisite to it. *Western Live Stock* v. *Bureau, supra,* 253, and cases cited.

In few of these cases could it be said with assurance that the local tax does not in some measure affect the commerce or increase the cost of doing it. But in them as in other instances of constitutional interpretation so as to insure the harmonious opera-

[3] United States Glue Co. *v.* Oak Creek, 247 U. S. 321; Underwood Typewriter Co. *v.* Chamberlain, 254 U. S. 113; Atlantic Coast Line R. Co. *v.* Daughton, 262 U. S. 413; Matson Navigation Co. *v.* State Board, 297 U. S. 441.

[4] Adams Express Co. *v.* Ohio, 165 U. S. 194; Wells, Fargo & Co. *v.* Nevada, 248 U. S. 165; St. Louis & E. St. L. R. *v.* Missouri, 256 U. S. 314; Southern Ry. *v.* Watts, 260 U. S. 519.

[5] Coe *v.* Errol, 116 U. S. 517; Bacon *v.* Illinois, 227 U. S. 504; Heisler *v.* Thomas Colliery Co., 260 U. S. 245; Minnesota *v.* Blasius, 290 U. S. 1. *Cf.* Hope Natural Gas Co. *v.* Hall, 274 U. S. 284.

[6] Brown *v.* Houston, 114 U. S. 622; Pittsburgh & So. Coal Co. *v.* Bates, 156 U. S. 577; American Steel & Wire Co. *v.* Speed, 192 U. S. 500; General Oil Co. *v.* Crain, 209 U. S. 211.

[7] Federal Compress & Warehouse Co. *v.* McLean, 291 U. S. 17; Chassaniol *v.* Greenwood, 291 U. S. 584.

[8] Eastern Air Transport, Inc. *v.* South Carolina, 285 U. S. 147; Gregg Dyeing Co. *v.* Query, 286 U. S. 472; Nashville, C. & St. L. Ry. Co. *v.* Wallace, 288 U. S. 249; Edelman *v.* Boeing Air Transport, Inc., 289 U. S. 249.

tion of powers reserved to the states with those conferred upon the national government, courts are called upon to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed. See *Woodruff* v. *Parham*, 8 Wall. 123, 131; *Brown* v. *Houston*, 114 U. S. 622; *Galveston, H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217, 225, 227; *South Carolina Highway Dept.* v. *Barnwell Bros., supra; Ford Motor Co.* v. *Beauchamp*, No. 17, October Term, 1939, decided December 11, 1939; cf. *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 523, *et seq.; Board of County Comm'rs Jackson County, Kansas* v. *United States*, No. 14, October Term, 1939, decided December 18, 1939.

Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce.

The present tax as applied to respondent is without the possibility of such consequences. Equality is its theme, cf. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 583. It does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the "use" of property which has just been moved in interstate commerce

sustained in *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86; *Henneford* v. *Silas Mason Co.*, *supra*; *Felt & Tarrant Mg. Co.* v. *Gallagher*, 306 U. S. 62; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, or the tax on storage or withdrawal for use by the consignee of gasoline, similarly sustained in *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472; *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249; *Edelman* v. *Boeing Air Transport Co.*, 289 U. S. 249, or the familiar property tax on goods by the state of destination at the conclusion of their interstate journey. *Brown* v. *Houston*, *supra*; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500.

If, as guides to decision we look to the purpose of the commerce clause to protect interstate commerce from discriminatory or destructive state action, and at the same time to the purpose of the state taxing power under which interstate commerce admittedly must bear its fair share of state tax burdens, and to the necessity of judicial reconciliation of these competing demands, we can find no adequate ground for saying that the present tax is a regulation which, in the absence of Congressional action the commerce clause forbids.[9] This Court has uniformly sustained a tax imposed by the state of the buyer upon a sale of goods, in several instances in the "original package", effected by delivery to the purchaser upon arrival at destination after an interstate journey, both when the local seller has purchased the goods extra-state for the purpose of resale, *Woodruff* v. *Parham*, *supra*; *Hinson* v. *Lott*, 8 Wall. 148; *Banker Bros.* v. *Pennsylvania*, *supra*; *Wiloil Corp.* v. *Pennsylvania*, *supra*; *Graybar Electric Co.* v. *Curry*, 308 U. S. —; — Ala. —, November 6, 1939, and when the extra-state seller has shipped them into the taxing state for sale there. *Hinson* v. *Lott*, *supra*; *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506. It has likewise sustained a fixed-sum license tax imposed on the agent of the interstate seller for the privilege of selling merchandise brought into the taxing state for the purpose of sale. *Machine Co.* v. *Gage*, 100 U. S. 676; *Emert* v. *Missouri*, 156 U. S. 296; *Kehrer* v. *Stewart*, 197 U. S. 60; *Baccus* v. *Louisiana*, 232 U. S. 334; *Wagner* v. *Covington*, 251 U. S. 95.

The only challenge made to these controlling authorities is by reference to unconstitutional "burdens" on interstate commerce

[9] The imposition on the seller of the duty to insure collection of the tax from the purchaser does not violate the commerce clause. See Monamotor Oil Co. *v.* Johnson, *supra*; Felt & Tarrant Mfg. Co. *v.* Gallagher, *supra*.

made in general statements which are inapplicable here because they are torn from their setting in judicial opinions and speak of state regulations or taxes of a different kind laid in different circumstances from those with which we are now concerned. See for example, *Galveston, H. & S. A. R. Co.* v. *Texas, supra; Cooney* v. *Mountain States Telephone Co.*, 294 U. S. 384; *Fisher's Blend Station* v. *Tax Commission*, 297 U. S. 650. Others will presently be discussed. But unless we are now to reject the plain teaching of this line of sales tax decisions, extending back for more than seventy years from *Graybar Electric Co.* v. *Curry, supra*, decided this term, to *Woodruff* v. *Parham, supra*, the present tax must be upheld. As we have seen, the ruling of these decisions does not rest on precedent alone. It has the support of reason and of a due regard for the just balance between national and state power. In sustaining these taxes on sales emphasis was placed on the circumstances that they were not so laid, measured or conditioned as to afford a means of obstruction to the commerce or of discrimination against it, and that the extension of the immunity of the commerce clause contended for would be at the expense of state taxing power by withholding from taxation property and transactions within the state without the gain of any needed protection to interstate commerce. *Woodruff* v. *Parham, supra*, 137, 140; *Hinson* v. *Lott, supra*, 152; *Sonneborn Bros.* v. *Cureton, supra*, 513, 514, 521; *Wiloil Corp.* v. *Pennsylvania, supra*, 174; cf. *Brown* v. *Houston, supra*; *Henneford* v. *Silas Mason Co., supra*, 583.[10]

[10] In all of these cases, except Henneford v. Silas Mason Co., *supra*, the taxed sale was of merchandise in the "original package", although the original package doctrine had been thought to be a "positive and absolute" limitation on the exercise of state power. American Steel & Wire Co. v. Speed, 192 U. S. 500, 521. The doctrine originated in Brown v. Maryland, 12 Wheat. 419, where a discriminatory tax on imports was involved. It was overthrown as to interstate commerce when the court found that it would be unjust to permit the merchant who engaged in interstate commerce to escape a tax which the state had levied on the sale of goods after their interstate shipment, but with equal justice on all merchants. Woodruff v. Parham, 8 Wall. 123; Hinson v. Lott, 8 Wall. 148. After its supposed recrudescence in Leisy v. Hardin, 135 U. S. 100, the opinions of Justice Miller in Woodruff v. Parham, *supra*, and of Justice Bradley in Brown v. Houston, 114 U. S. 622, were explained by Chief Justice (then Justice) White in American Steel & Wire Co. v. Speed, *supra*, at 521, as the recognition by the court that the question was not whether "interstate commerce was to be considered as having completely terminated", but whether a particular exertion of taxing power by a state "so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress." He pointed out that the Court in these cases "conceded that the goods which

Apart from these more fundamental considerations which we think are of controlling force in the application of the commerce clause, we can find no adequate basis for distinguishing the present tax laid on the sale or purchase of goods upon their arrival at destination at the end of an interstate journey from the tax which may be laid in like fashion on the property itself. That the latter is a permissible tax has long been established by an unwavering line of authority. *Brown* v. *Houston, supra; Coe* v. *Errol,* 116 U. S. 517; *Pittsburgh & So. Coal Co.* v. *Bates,* 156 U. S. 577; *American Steel & Wire Co.* v. *Speed, supra,* 520; *General Oil Co.* v. *Crain,* 209 U. S. 211; *Bacon* v. *Illinois,* 227 U. S. 504. As we have often pointed out, there is no distinction in this relationship between a tax on property, the sum of all the rights and powers incident to ownership, and the taxation of the exercise of some of its constituent elements. *Nashville, Chattanooga & St. Louis Ry. Co.* v. *Wallace, supra,* 267, 268; *Henneford* v. *Silas Mason Co., supra,* 582; cf. *Bromley* v. *McCaughn,* 280 U. S. 124, 136-138. If coal situated as that in

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were taxed had not completely lost their character as interstate commerce since they had not been sold in the original package. As however they had arrived at their destination, were at rest in the state, were enjoying the protection which the laws of the state afforded, and were taxed without discrimination like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce." Cf. Cardozo, J., in Baldwin *v.* Seelig, 294 U. S. 511, 526:

"The test of the 'original package,' which came into our law with Brown *v.* Maryland, 12 Wheat. 419, is not inflexible and final for the transactions of interstate commerce, whatever may be its validity for commerce with other countries. Cf. Woodruff *v.* Parham, *supra;* Anglo-Chilean Nitrate Sales Corp. *v.* Alabama, 288 U. S. 218, 226. There are purposes for which merchandise, transported from another state, will be treated as a part of the general mass of property at the state of destination though still in the original containers. This is so, for illustration, where merchandise so contained is subjected to a non-discriminatory property tax which it bears equally with other merchandise produced within the state. Sonneborn Bros. *v.* Cureton, 262 U. S. 506; Texas Co. *v.* Brown, 258 U. S. 466, 475; American Steel & Wire Co. *v.* Speed, 192 U. S. 500. . . . 'A state tax upon merchandise brought in from another State, or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another State.' Sonneborn Bros. *v.* Cureton, *supra,* at p. 516. Cf. Bowman *v.* Chicago & N. W. Ry. Co., 125 U. S. 564, 491; . . . In brief, the test of the original package is not an ultimate principle. It is an illustration of a principle. Pennsylvania Gas Co. *v.* Public Service Comm'n, 225 N. Y. 397, 403; 122 N. E. 260. It marks a convenient boundary and one sufficiently precise save in exceptional conditions. What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement."

the present case, was, before its delivery, subject to a state property tax, see *Brown* v. *Houston, supra; Pittsburgh & So. Coal Co.* v. *Bates, supra;* transfer of possession of the coal upon a sale is equally taxable, see *Wiloil Corporation* v. *Pennsylvania, supra,* 175, just as was the storage or use of the property in similar circumstances held taxable in *Nashville, Chattanooga & St. L. R. Co.* v. *Wallace, supra; Henneford* v. *Silas Mason Co., supra.*

Respondent, pointing to the course of its business and to its contracts which contemplate the shipment of the coal interstate upon orders of the New York customers, insists that a distinction is to be taken between a tax laid on sales made, without previous contract, after the merchandise has crossed the state boundary, and sales, the contracts for which when made contemplate or require the transportation of merchandise interstate to the taxing state. Only the sales in the state of destination in the latter class of cases, it is said, are protected from taxation by the commerce clause, a qualification which respondent concedes is a salutary limitation upon the reach of the clause since its use is thus precluded as a means of avoiding state taxation of merchandise transported to the state in advance of the purchase order or contract of sale.

But we think this distinction is without the support of reason or authority. A very large part, if not most of the merchandise sold in New York City, is shipped interstate to that market. In the case of products like cotton, citrus fruits and coal, not to mention many others which are consumed there in vast quantities, all have crossed the state line to seek a market, whether in fulfillment of a contract or not. That is equally the case with other goods sent from without the state to the New York market, whether they are brought into competition with like goods produced within the state or not. We are unable to say that the present tax, laid generally upon all sales to consumers within the state, subjects the commerce involved where the goods sold are brought from other states, to any greater burden or affects it more, in any economic or practical way, whether the purchase order or contract precedes or follows the interstate shipment. Since the tax applies only if a sale is made, and in either case the object of interstate shipment is a sale at destination, the deterrent effect of the tax would seem to be the same on both. Restriction of the scope of the commerce clause so as to

prevent recourse to it as a means of curtailing state taxing power seems as salutary in the one case as in the other.

True, the distinction has the support of a statement *obiter* in *Sonneborn Bros.* v. *Cureton, supra,* 515, and seems to have been tacitly recognized in *Ware & Leland* v. *Mobile County,* 209 U. S. 405, 412, and *Banker Bros. Co.* v. *Pennsylvania, supra,* although in each case a tax on the sale of goods brought into the state for sale was upheld. But we have sustained the tax where the course of business and the agreement for sale plainly contemplated the shipment interstate in fulfilment of the contract. *Wiloil Corporation* v. *Pennsylvania, supra,* 173; *Graybar Electric Co.* v. *Curry, supra.* In the same circumstances the Court has upheld a property tax on the merchandise transported, *American Steel Wire Co.* v. *Speed, supra; General Oil Co.* v. *Crain, supra;* see *Bacon* v. *Illinois, supra,* 515, 516; upon its use, *Monamotor Oil Co.* v. *Johnson, supra; Felt & Tarrant Co.* v. *Gallagher, supra,* and upon its storage; cf. *Gregg Dyeing Co.* v. *Query, supra; Nashville, C. & St. L. Ry. Co.* v. *Wallace, supra.* Taxation of property or the exercise of a power over it immediately preceding its previously contemplated shipment interstate has been similarly sustained. *Coe* v. *Errol, Bacon* v. *Illinois, supra; Federal Compress & Warehouse Co.* v. *McLean,* 291 U. S. 17. For reasons already indicated all such taxes upon property or the exercise of the powers of ownership stand in no different relation to interstate commerce and have no different effect upon it than has the present sales tax upon goods whose shipment interstate into the taxing state was contemplated when the contract was entered into.

It is also urged that the conclusion which we reach is inconsistent with the long line of decisions of this Court following *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, which have held invalid, license taxes to the extent that they have sought to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. In some instances the tax appeared to be aimed at suppression or placing at a disadvantage this type of business when brought into competition with competing intrastate sales. See *Robbins* v. *Shelby County Taxing District, supra,* 498; *Caldwell* v. *North Carolina,* 187 U. S. 622, 632.[11] In all, the statute,

[11] When the Robbins case was decided, sixteen states required the payment of license taxes by some kinds of drummers. For citations of the

in its practical operation, was capable of use, through increase in the tax, and in fact operated to some extent to place the merchant thus doing business interstate at a disadvantage in competition with untaxed sales at retail stores within the state. While a state, in some circumstances may, by taxation suppress or curtail one type of intrastate business to the advantage of another type of competing business which is left untaxed, see *Puget Sound Power & Light Co.* v. *Seattle*, 291 U. S. 619, 625, and cases cited, it does not follow that interstate commerce may be similarly affected by the practical operation of a state taxing statute. Compare *Hammond Packing Co.* v. *Montana*, 233 U. S. 331, *Magnano Co.* v. *Hamilton*, 292 U. S. 40, with *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Robbins* v. *Shelby County Taxing District, supra; Sprout* v. *South Bend* 277 U. S. 163. It is enough for present purposes that the rule of *Robbins* v. *Shelby County Taxing District, supra*, has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate. Compare *Robbins* v. *Shelby County Taxing District, supra*, with *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1, see *Machine Co.* v. *Gage, supra; Wagner* v. *Covington, supra;* and that the actual and potential effect on the commerce as such a tax is wholly wanting in the present case.

Finally it is said that the vice of the present tax is that it is measured by the gross receipts from interstate commerce and thus in effect reaches for taxation the commerce carried on both within and without the taxing state. *Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307; *Gwin, White & Prince* v. *Henneford, supra;* cf. *Western Live Stock* v. *Bureau, supra*, 260. It is true that a state

statutes, see, Lockhart, Sales Tax in Interstate Commerce, 52 Harv. L. Rev. 617, 621. More recently it has been estimated that almost 800 municipal ordinances directed at drummers were adopted for the purpose of embarrassing this competition with local merchants. Hemphill, the House to House Canvasser in Interstate Commerce, 60 Am. L. Rev. 641. The court was cognizant of this trend, see Robbins v. Shelby County Taxing District, 120 U. S. 489, 498. Following this decision 19 such taxes were declared invalid. Carson v. Maryland, 120 U. S. 502; Asher v. Texas, 128 U. S. 129; Stoutenburgh v. Hennick, 129 U. S. 141; Brennan v. Titusville, 153 U. S. 289; Stockard v. Morgan, 185 U. S. 27; Caldwell v. North Carolina, 187 U. S. 622; Crenshaw v. Arkansas, 227 U. S. 389; Rogers v. Arkansas, 227 U. S. 401; Stewart v. Michigan, 232 U. S. 665; Davis v. Virginia, 236 U. S. 697; Real Silk Hosiery Mills v. Portland, 268 U. S. 325. Read in their proper historical setting these cases may be said to support the view that this kind of a tax is likely to be used "as an instrument of discrimination against interstate or foreign commerce", see DiSanto v. Pennsylvania, 273 U. S. 34, 39.

tax upon the operations of interstate commerce measured either by its volume or the gross receipts derived from it has been held to infringe the commerce clause, because the tax if sustained would exact tribute for the commerce carried on beyond the boundaries of the taxing state, and would leave each state through which the commerce passes free to subject it to a like burden not borne by intrastate commerce. See *Western Live Stock* v. *Bureau, supra,* 255; *Gwin, White & Prince* v. *Henneford, supra,* 439.

In *Adams Manufacturing Co.* v. *Storen, supra,* 311, 312, a tax on gross receipts, so far as laid by the state of the seller upon the receipts from sales of goods manufactured in the taxing state and sold in other states, was held invalid because there the court found the receipts derived from activities in interstate commerce, as distinguished from the receipts from activities wholly intrastate, were included in the measure of the tax, the sales price, without segregation or apportionment. It was pointed out, pages 310, 311 and 312, that had the tax been conditioned upon the exercise of the taxpayer's franchise or its privilege of manufacturing in the taxing state, it would have been sustained, despite its incidental effect on interstate commerce since the taxpayer's local activities or privileges were sufficient to support such a tax, and that it could fairly be measured by the sales price of the goods. Compare *American Manufacturing Co.* v. *St. Louis,* 250 U. S. 459 with *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292. See *Western Live Stock* v. *Bureau, supra,* 257-259; cf. *Bass, Ratcliff & Gretton* v. *State Taxing Commission,* 266 U. S. 271, 280; *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 387-8; *Pacific Co., Ltd.* v. *Johnson,* 285 U. S. 480.

The rationale of the *Adams Manufacturing Co.* case does not call for condemnation of the present tax. Here the tax is conditioned upon a local activity delivery of goods within the state upon their purchase for consumption. It is an activity which apart from its effect on the commerce, is subject to the state taxing power. The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce.

In two instances already noted, respondent's contracts with Austin, Nichols & Co., and with the New England Steampship Com-

pany call for delivery of the coal at points outside of New York, in the one case f.o.b. at the mines in Pennsylvania, and in the other at the pier in Jersey City, New Jersey, and deliveries were made accordingly.

Respondent asked the state courts to rule that the taxing act did not apply to these transactions, particularly because the enabling statute expressly prohibits the city from imposing a tax upon "any transaction originating and/or consummated outside the territorial limits of the City". See *Matter of Gunther's Sons* v. *McGoldrick*, 279 N. Y. 148. This question the state courts left unanswered, the Court of Appeals resting its decision wholly on the constitutional ground.

Upon the remand of this cause for further proceedings not inconsistent with this decision, the state court will be free to decide the state question, and the remand will be without prejudice to the further presentation to this Court of any federal question remaining undecided here, if the state court shall determine that the taxing statute is applicable.

Reversed.

SUPREME COURT OF THE UNITED STATES.

No. 475.—October Term, 1939.

Joseph D. McGoldrick, Comptroller of the City of New York, Petitioner, *vs.* Berwind-White Coal Mining Company.	On Writ of Certiorari to the Supreme Court of the State of New York.

[January 29, 1940.]

Mr. Chief Justice Hughes, dissenting.

The pressure of mounting outlays has led the States to seek new sources of revenue, and we have gone far in sustaining state power to tax property and transactions subject to their jurisdiction despite incidental or indirect effects upon interstate commerce. But hitherto we have also maintained the principle that the States cannot lay a direct tax upon that commerce. In the instant case, the Court of Appeals of New York has decided unanimously that the tax as here applied is such a tax and goes beyond the limit of state power. 281 N. Y. 94. See, also, *Matter of National Cash Register Co.* v. *Taylor*, 276 N. Y. 208. I think that the judgment should be affirmed.

The case is one of interstate commerce in its most obvious form. The Berwind-White Company is a Pennsylvania corporation engaged in mining coal in that State. It has a sales' office in New York. Its coal is mined from two veins known as "B Seam" and "C Prime Seam". The coal is sold to New York consumers for plants and steamships. The contracts of sale call for coal from the seller's mines in Pennsylvania, most of it being of the "B Seam" sort. The contracts are generally for a specified period, orders being given as coal is needed. The purchasers notify the mining company of their requests, whereupon the coal is mined to meet the orders, two days being allowed for mining and five for transportation. The coal is transported from the mines by railroad to a pier in Jersey City where the seller's barges take the coal and bring it alongside the purchasers' plant or steamship where delivery is made, the pur-

chasers doing the unloading. There were two purchasers who took delivery outside New York.

The tax is two per cent of the entire purchase price. The Court of Appeals has described the tax as "two per cent upon receipts from every sale of tangible personal property sold within the City". *Matter of Sears, Roebuck & Co.* v. *McGoldrick*, 279 N. Y. 184, 197. There can be no doubt as to the incidence of the tax in this instance. The Comptroller of the City has assessed the tax against the seller, the Berwind-White Company. The statute requires the seller, under penalty, to file a return of its sales and to pay the tax. To enforce the payment, the property of the seller may be levied upon under a Comptroller's warrant. It is the tax so laid that the City now demands. In the *Matter of Atlas Television Co.*, 273 N. Y. 51, 57, 58, the Court of Appeals held that the contention that the seller was required only to collect the tax as the agent of the City could not be sustained and hence it was decided that in case of the seller's insolvency the City was entitled to priority of payment. The court said: "The duty of payment *to the city* is laid upon the vendor, not the purchaser. His liability is not measured by the amount actually collected from the purchaser but by the receipts required to be included in such return. (§ 6.) He must pay the tax even if failure to collect is due to no fault of his own". This statement was repeated in *Matter of Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113, 118, and while it was there said that the *Atlas* case did not hold that the sales tax was "imposed" on the vendor, still the court again ruled that the vendor "is under a duty to pay the tax to the city regardless of whether or not the vendor collects it from the purchaser". *Id.*, p. 124. If the vendor must pay the tax whether or not he can recoup the amount from the purchaser, and the tax, as here, is assessed against the vendor, it would seem inadmissible to defend the tax upon the ground that it is a tax upon the purchaser. From any point of view, the tax now contested is laid upon interstate sales.

In confiding to Congress the power to regulate interstate commerce, the aim was to provide a free national market,—to pull down and prevent the re-erection of state barriers to the free intercourse between the people of the States. That free intercourse was deemed, and has proved, to be essential to our national economy. It should not be impaired. As we recently said in *Baldwin* v. *Seelig*, 294 U. S. 511, 522: "Imposts and duties upon interstate commerce are

placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. . . . 'It is the established doctrine of this court that a State may not, in any form or under any guise, directly burden the prosecution of interstate business' ".

Undoubtedly the problem of maintaining the proper balance between state and national power has been a most difficult one. We have recognized the power of the State to meet local exigencies in protecting health and safety and preventing fraud, as, for example, in the case of quarantine, pilotage and inspection laws, although interstate or foreign commerce is involved; that is, until Congress in the exercise of its paramount authority displaces such local requirements.[1] We have also recognized the power of the State to tax property subject to its jurisdiction although the property has come from another State, when it is found that interstate commerce has ended and that the property has become a part of the common mass within the State. We have sustained the authority of the State to impose occupation taxes when they were deemed to be so measured or apportioned as to relate appropriately to the privilege of transacting an intrastate business. The application of these principles has led to close distinctions.[2] But that fact would seem to present no good reason for sweeping away the protection of interstate commerce where the State lays a direct tax upon that commerce as in this case.

We have said in a long line of decisions, that the States cannot tax interstate commerce either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it.[3] The same principle has been declared in recent cases. In *Fisher's Blend Station* v. *Tax Commission*, 297 U. S. 650, 655, we said: "As appellant's income

1 See cases collected in Minnesota Rate Cases, 230 U. S. 352, 403-411.

2 See Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 254-257.

3 Minnesota Rate Cases, 230 U. S. 352, 400; State Freight Tax Case, 15 Wall. 232; Robbins v. Shelby Taxing District, 120 U. S. 489; Philadelphia & Southern Mail S. S. Co. v. Pennsylvania, 122 U. S. 326; Leloup v. Mobile, 127 U. S. 640; McCall v. California, 136 U. S. 104; Brennan v. Titusville, 153 U. S. 289; Galveston, Harrisburg & San Antonio Railway Co. v. Texas, 210 U. S. 217; Western Union Telegraph Co. v. Kansas, 216 U. S. 1; Pullman Co. v. Kansas, 216 U. S. 1, 56; Meyer v. Wells, Fargo & Co., 223 U. S. 298; Crenshaw v. Arkansas, 227 U. S. 389; Crew-Levick Co. v. Pennsylvania, 245 U. S. 292; Sonneborn v. Cureton, 262 U. S. 506, 515; Fisher's Blend Station v. Tax Commission, 297 U. S. 650, 655; Puget Sound Co. v. State Tax Commission, 302 U. S. 90; Adams Manufacturing Co. v. Storen, 304 U. S. 307, 311; Gwin, White & Prince v. Henneford, 305 U. S. 434, 439.

is derived from interstate commerce, the tax, measured by appellant's gross income, is of a type which has long been held to be an unconstitutional burden on interstate commerce". There, a state occupation tax upon the gross receipts of the owner of a radio station from broadcasting programs to listeners within and beyond the State was held invalid. It was said to be enough that the tax was levied on gross receipts from the proprietor's "entire operations, which include interstate commerce". *Id.*, p. 656. In *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, a tax on the gross receipts from the sale of advertising by a trade journal was sustained because in the last analysis the tax, like that upon the privilege of manufacturing within the State, was upon the carrying on of a local business in the preparing, printing and publishing a magazine. *Id.*, p. 258. Soon after, we held in *Adams Manufacturing Company* v. *Storen*, 304 U. S. 307, 311, that a state tax could not be constitutionally applied to the gross receipts derived by an Indiana corporation in interstate commerce through the sale of its products manufactured in Indiana to customers in other States. And, but a year ago, in *Gwin, White & Prince* v. *Henneford*, 305 U. S. 435, 436, 438, we held invalid a state tax measured by the gross receipts from the business of marketing fruit shipped in interstate commerce from the State of production to places in other States where the sales and deliveries were made and the proceeds collected. If the question now before us is controlled by precedent, the result would seem to be clear.

In relation to the present transaction, it would hardly be contended that New York could tax the transportation of the coal from Pennsylvania to New York or a contract for that transportation. But the movement of the coal from the one State to the other was definitely required by the contracts of sale and these sales must be regarded as an essential part of the commercial intercourse contemplated by the commerce clause. *Gibbons* v. *Ogden*, 9 Wheat, 1, 188. The tax on the gross receipts of the seller from these sales was manifestly an imposition upon the sales themselves. Whether the tax be small or large, it is plainly to the extent of it a burden upon interstate commerce; and as it is imposed immediately upon the gross receipts from that commerce, it is a direct burden. And, as we have often said, where what is taxed is subject to the jurisdiction of the State, the size of the tax lies within the discretion of the State, and not of this Court. *A. Magnano Company* v.

Hamilton, 292 U. S. 40, 45. See, also, *Alaska Fish Company* v. *Smith*, 255 U. S. 44, 48.

How then can the laying of such a burden upon interstate commerce be justified? It is urged that there is a taxable event within the State. That event is said to be the delivery of the coal. But how can that event be deemed to be taxable by the State? The delivery is but the necessary performance of the contract of sale. Like the shipment from the mines, it is an integral part of the interstate transaction. It is said that title to the coal passes to the purchaser on delivery. But the place where the title passes has not been regarded as the test of the interstate character of a sale. We have frequently decided that where a commodity is mined or manufactured in one State and in pursuance of contracts of sale is delivered for transportation to purchasers in another State, the mere fact that the sale is f. o. b. cars in the seller's State and the purchaser pays the freight does not make the sale other than interstate.[4] And when, as here, the buyer in an interstate sale takes delivery in his own State, that delivery in completion of the sale is as properly immune from state taxation as is the transportation to the purchaser's dock or vessel. Moreover, even if it were possible to sustain a state tax by reason of such delivery within the State, there would still be no ground for sustaining a tax upon the whole of the interstate transaction of which the delivery is only a part, as in the case of a tax upon the entire gross receipts.

Petitioner strongly insists that in substance the tax here should be regarded as the same as a *use* tax the validity of which this Court has sustained. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577; *Southern Pacific Company* v. *Gallagher*, 306 U. S. 167. But in the *Henneford* case, Mr. Justice Cardozo, in speaking for the Court, was most careful to show that the use tax was upheld because it was imposed after interstate commerce had come to an end. In making this distinction, the Court clearly recognized that a tax imposed directly upon interstate commerce would be beyond the State's power, and the tax was sustained as one upon property which had come to rest within the State and like other property was subject to its jurisdiction. The Court said: "The tax is not upon the operations of interstate commerce, but

[4] Savage v. Jones, 225 U. S. 501, 520; Pennsylvania R. R. Co. v. Clark Coal Co., 238 U. S. 456, 465, 468; Carter v. Carter Coal Co., 298 U. S. 238, 320; Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453, 463.

upon the privilege of use after commerce is at an end. . . . The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership". *Id.*, p. 582. And later, in *Puget Sound Company* v. *State Tax Commission*, 302 U. S. 90, 92, 94, Mr. Justice Cardozo in delivering the opinion of the Court, after showing that the business of the company, so far as it consisted of the loading and discharge of cargoes by longshoremen subject to its own control, was interstate or foreign commerce, concluded that the State was "not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts". He observed that "Decisions to that effect are many and controlling". The fact that a use tax, sustained as a tax upon an attribute of property which is subject to the jurisdiction of the State, may have an incidental or indirect effect upon interstate commerce, and thus in the opinion of commentators may tend to discourage interstate transactions, is certainly no excuse for going further and upholding the action of States which, looking with a jealous eye upon the freedom of interstate commerce, attempt to lay a direct tax upon that commerce.

The point was clearly brought out by Mr. Justice Holmes, speaking for the Court in *Galveston, Harrisburg & San Antonio Railway Co.* v. *Texas*, 210 U. S. 217, 227, when he referred to the necessity of maintaining the distinction between taxation of property within the State, which had long been upheld, and taxation of interstate business which had been condemned. He observed that "When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce". Accordingly a state tax upon gross receipts which included receipts from interstate business was held invalid.

The ground most strongly asserted for sustaining the tax in the present case is that it is non-discriminatory. Undoubtedly a state tax may be bad because it is so laid as to involve a hostile discrimination against interstate commerce. But does it follow that a State may lay a direct tax upon interstate commerce because it is free to tax its own commerce in a similar way? Thus, a State may tax intrastate transportation, but it may not tax interstate transportation. The State may tax intrastate sales,[5] but can the State tax interstate

[5] Woodruff v. Parham, 8 Wall. 123; Sonneborn Bros. v. Cureton, 262 U. S. 506, 515, 516; Wiloil Corporation v. Pennsylvania, 294 U. S. 169, 175.

sales in order to promote its local business? It would seem to be extraordinary if a State could escape the restriction against direct impositions upon interstate commerce by first laying exactions upon its own trade and then insisting that in order to make its local policy completely effective it must be allowed to lay similar exactions upon interstate trade. That would apparently afford a simple method for extending state power into what has hitherto been regarded as a forbidden field. Moreover, it may or may not be in the interest of the State to promote domestic trade in a given commodity. The State may seek by its taxing scheme to restrict such trade and the mere equivalency of a tax upon domestic business would not prevent the injurious effect upon interstate transactions. See *A. Magnano Company* v. *Hamilton, supra.*

So, while recognizing that a tax discriminating against interstate commerce is necessarily invalid, it has long been held by this Court in the interest of the constitutional freedom of that commerce that a direct tax upon it is not saved because the same or a similar tax is laid also upon intrastate commerce. The Court dealt specifically with that question in *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 497, saying: "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State". See, also, *Cooney* v. *Mountain States Telephone Co.*, 294 U. S. 384, 393, 394. And very recently, in *Adams Manufacturing Company* v. *Storen, supra*, p. 312, where a tax on the gross receipts derived from interstate sales was held invalid, we said explicitly: "The opinion of the State Supreme Court stresses the generality and non discriminatory character of the exaction, but it is settled that this will not save the tax if it directly burdens interstate commerce".

We have directed attention to a vice in imposing direct taxes upon interstate commerce in that such taxes might be imposed with equal right by every State which the commerce touches. This has been observed with respect to taxes upon gross receipts from interstate transactions. In *Western Live Stock* v. *Bureau of Revenue, supra*, p. 256, we said: "The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce

clause to remove". See, also, *Gwin, White & Prince* v. *Henneford, supra.* But petitioner has insisted that in the present case there is no danger of multiple taxation in that New York puts its tax upon an event which cannot occur in any other State. Of course the delivery of the coal in New York is an event which cannot occur in another State. Just as New York cannot tax the shipment of coal from the mines in Pennsylvania or the transshipment of the coal in New Jersey, so neither Pennsylvania nor New Jersey can tax the delivery in New York. Petitioner's argument misses the point as to the danger of multiple taxation in relation to interstate commerce. The shipment, the transshipment and the delivery of the coal are but parts of a unitary interstate transaction. They are integral parts of an interstate sale. If, because of the delivery in New York, that State can tax the gross receipts from the sale, why cannot Pennsylvania by reason of the shipment of the coal in that State tax the gross receipts there? That would not be difficult, as the seller is a Pennsylvania corporation and in fact in many, if not in most, instances, the purchase price of the goods shipped to New York is there received. The point is not that the delivery in New York is an event which cannot be taxed by other States, but that the authority of New York to impose a tax on that delivery cannot properly be recognized without also recognizing the authority of other States to tax the parts of the interstate transaction which take place within their borders. If New York can tax the delivery, Pennsylvania can tax the shipment and New Jersey the transshipment. And the latter States, respectively, would be as much entitled to tax the gross receipts from the sales as would New York. Even if it were assumed that the gross receipts from the interstate sales could be apportioned so that each State could tax such portion of the receipts as could be deemed to relate to the part of the transaction within its territory, still this would not help New York here, as there has been no attempt at apportionment. The taxation of the gross receipts in New York, on any appropriate view of what pertains to the interstate sales, would seem clearly to involve the danger of multiple taxation to which we have adverted in recent decisions.

Doubtless much can be said as to the desirability of a comprehensive system of taxation through the cooperation of the Union and the States so as to avoid the differentiations which beset the application of the commerce clause and thus to protect both state and

national governments by a just and general scheme for raising revenues. However important such a policy may be, it is not a matter for this Court. We have the duty of maintaining the immunity of interstate commerce as contemplated by the Constitution. That immunity still remains an essential buttress of the Union, and a free national market, so far as it can be preserved without violence to state power over the subjects within state jurisdiction, is not less now than heretofore a vital concern of the national economy.

The tax as here applied is open to the same objection as a tariff upon the entrance of the coal into the State of New York, or a state tax upon the privilege of doing an interstate business, and in my view it cannot be sustained without abandoning principles long established and a host of precedents soundly based.

Mr. Justice McREYNOLDS and Mr. Justice ROBERTS join in this opinion.